

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA

v.

Case No. CR13F-1960 thru 1963

Hearing Date: July 8, 2013 at 1:00 p.m.

TODD SCHNEIDER

**DEFENDANT'S REPLY TO OPPOSITION TO
MOTION TO DISMISS INDICTMENTS**

The defendant, by counsel, in response the Commonwealth's Brief in Opposition, renews his Motion to Dismiss and replies as follows.

The Commonwealth completely misses the point. One of the fundamental decisions that prosecutors make is "whether or not to prosecute an individual." See Lux v. Commonwealth, 24 Va. App. 561, 568, 484 S.E.2d 145, 148 (1997). All parties agree that the Office of the Attorney General (OAG) had a conflict of interest when it made the decision to charge Todd Schneider and to obtain the indictments in this case. Accordingly, the indictments should be dismissed. It is just that simple.

Instead, the Commonwealth ignores that a conflicted prosecutor made the decision to prosecute and took all of the steps necessary to obtain these four indictments. In its "Facts and Procedural History," the Commonwealth does not even acknowledge the role of the OAG in this process; it just says that the Multi-Jurisdictional Grand Jury returned four indictments. From reading the Commonwealth's Brief, the indictments apparently just happened without any action or charging decision by the OAG, who then got involved in the case for the purpose of prosecuting indictments for which it had no responsibility. If that fiction were true, the Commonwealth's argument might make sense that the conflict of the OAG in the prosecution of

the case was cured by its recusal. But that fiction is not true – it is utter nonsense. The OAG made the decision to charge Mr. Schneider, and it made all of the numerous other decisions that caused these four indictments to be before the Court. Those other decisions included: the crimes to be alleged; the number of charges; the dates of the charges; the manner of charging; the grand jury it would use; the date of indictment; the witness to send to the grand jury; and the witnesses and evidence it would *not* send to the grand jury.

When it made those decisions, the OAG was actively representing two clients with conflicting and adverse interests. The OAG was counsel to the Governor and the staff of the Governor's administration ("Executive Branch clients"). See Commonwealth's Brief in Support of Motion to Recuse, filed April 26, 2013, paragraph 11. At the same time, the OAG was also the attorney for the Commonwealth in the OAG's investigation of suspected criminal activity at the Executive Mansion. On March 8, 2012, Todd Schneider gave the OAG information about a suspicious unreported payment of \$15,000 by a businessman (Jonnie Williams) to the Governor, and additional information indicating that its Executive Branch clients had engaged in a pattern of felonious conduct. The OAG then had two conflicting responsibilities. First, as an attorney for the Commonwealth, it had a duty to investigate and consider prosecuting the criminal activities that its Executive Branch clients appeared to have committed. Second, as the attorney for those Executive Branch clients, it had a duty to counsel and represent them in order to protect them from a criminal investigation. Any prosecutor in this state would have withdrawn immediately from the representation of both clients and sought separate counsel for each.¹

¹ In addition, the OAG has admitted that it had a conflict in this case because of the AG's financial and professional connections to a witness, Mary Shea Sutherland. Those conflicts were

Instead, the OAG did nothing. It refused to investigate the criminal conduct of its Executive Branch clients, and it ignored its statutory obligation under Va. Code §2.2-3126(A) to investigate the Governor's failure to disclose gifts on his financial disclosure form and to designate an independent prosecutor to consider prosecution. No such designation was made until after the presidential election in November, 2012, and on the eve of the expiration of the statute of limitations.

Ultimately, the OAG decided to charge Mr. Schneider. Because the OAG had a conflict of interest for the 13 months preceding that decision and at the very time that the OAG obtained the indictments in this case, those indictments should be dismissed. Todd Schneider was denied due process because the decision to prosecute him was not made by an impartial prosecutor.

SCHNEIDER'S INFORMATION

In its response to the Motion to Dismiss Indictments, the Commonwealth incorrectly asserts that the evidence Mr. Schneider provided of wrongdoing at the Mansion was *unrelated* to this case, and that the OAG appointed a special prosecutor to investigate that wrongdoing. (Commonwealth's Brief at p. 2) Neither of these assertions is true.

In addition to exposing the corrupt pay-to-play relationship between the McDonnells and Jonnie Williams, Mr. Schneider described a pattern of using public assets – including his labor and that of other state employees – for the private, personal, and political purposes of the McDonnells.² Part of the March, 2012, debriefing focused on the hosting of private non-state

known to the OAG as early as May, 2012. *See* Motion to Dismiss Indictments filed April 29, 2013 (paragraphs 2-9).

² Current counsel for the Commonwealth was not present at the March 8, 2012, debriefing. Their mistaken impressions of the information provided may be a result of the fact that their only

events at the Mansion. Schneider discussed documentation that showed that the Mansion and other state resources (in particular, but not exclusively, his own labor as a state employee) were being used for private, personal, and political events by the McDonnells and the McDonnell administration. Schneider also described the McDonnells' use of state employees to run personal errands for their adult children, and their use of state credit cards to buy personal items for the entire family.

The use of public assets – including the labor of a state employee – for private or personal purposes was specifically criminalized by the Virginia General Assembly and signed into law by Virginia Governor Tim Kaine in 2008. The offense, Va. Code §18.2-112.1, is included in Article 4 of Chapter 5 of Title 18.2, “Embezzlement and Fraudulent Conversions.” Where the value of the use of public assets exceeds \$1,000 in any 12-month period, it is a Class 4 felony carrying a prison sentence of 2–10 years, and a fine of up to \$100,000. The use of state employees for political purposes is also specifically prohibited by state policy.³

This misuse of public assets by the McDonnells was one of the reasons Schneider was told to take the food that they now accuse him of embezzling. Schneider was told - as a state employee - to provide catering services for events held at the Mansion and to do personal shopping far beyond the scope of his employment as the cook for the family in residence at the Mansion. Although the McDonnells used Schneider as their personal shopper and private caterer,

knowledge of the substance of the information comes from an incomplete summary of an investigator's recall of the debriefing.

³ See Section “Miscellaneous Topics, Political Activity” in the Employee Handbook: available at: <http://www.dhrm.virginia.gov/publications/employee-handbook-2008> and Appendix C in the Handbook for Agency Heads: available at: <http://www.dhrm.state.va.us/resources/agency-headbook-2008.pdf>

state officials refused to issue checks to pay Schneider or his catering company for these extra services. As a work-around, Sarah Scarbrough, the Executive Director of the Mansion, told Schneider to pay his company in food and supplies ordered on Mansion accounts.

Schneider explained this “trade-agreement” to the OAG. Because it directly implicated the Executive Branch clients of the OAG in serious criminal activity, the OAG had an immediate and obvious conflict of interest.

In addition to Schneider’s alerting the OAG to these possible violations of state law and policy for the misuse of public assets, the investigators obtained documentation on February 17, 2012, that detailed the extent of the possible criminal activity. On that date, investigators received a chart from Scarbrough that listed some of the events held at the Mansion from 2010 to February 8, 2012. (Attachment A) This listing includes numerous non-state events for which Todd Schneider was forced to provide chef and catering services, the majority of which were events hosted by the Governor’s Political Action Committee (PAC), “Opportunity VA,” for political purposes. These events included, but were not limited to, Republican Party of Virginia Leadership receptions; Movement Conservative Events; the Huff, Poole and Mahoney Holiday Party; the PAC Christmas party; Legislators Christmas Party; and PAC Appreciation events. For each of these non-state and political events, Todd Schneider was required by the McDonnells or the Governor’s Administration to provide cooking and catering services for which he was not compensated by the PAC or the other private groups. He performed this private non-state work for the McDonnells on his state salary. When he asked how he or his catering company would be paid, he was told to “do it the usual way” or to “take it out in trade.” The OAG learned from Schneider what was corroborated by the additional documentation obtained from the Mansion

executive director: that the McDonnells and the Governor's Administration engaged in a pattern of activity involving the possible misuse of thousands of dollars of public assets for private, personal, and political purposes, possibly constituting Class 4 felony violations of Virginia state law.

Instead of investigating these possible violations of state law and policy by the McDonnells and the Governor's administration, the OAG – which has admitted a conflict of interest because of an attorney-client relationship with the Governor's administration – did nothing for one year, and then indicted the person who had reported the misconduct and whose labor as a state employee had been misused.

Contrary to the Commonwealth's assertion, the OAG did not "appoin[t] the Commonwealth's Attorney for the City of Richmond to investigate Mr. Schneider's allegations against the Governor of Virginia." (Commonwealth's Brief at p. 2) In fact, the OAG designated Michael Herring only to "review certain Statements of Economic Interest filed by the Governor" and "to conduct an investigation into possible violations of financial disclosure provisions."⁴ (Statements of Michael Herring and Ken Cuccinelli contained in Nolan, Jim, *City Prosecutor Investigating McDonnell's Disclosures*, Richmond Times Dispatch, May 23, 2013 – cited by the Commonwealth in its Brief on p. 2)(Attachment B) Neither Herring nor any other prosecutor

⁴ The appointment of Michael Herring to investigate possible financial disclosures violations – misdemeanor offenses – did not occur until 8 months after the debriefing of Todd Schneider and shortly before the 12-month statute of limitations on the misdemeanor offenses was due to lapse. See Va. Code §2.2-3125.

No reason has been provided for this intentional delay in the appointment and is additional evidence that the OAG acted intentionally to protect the interests of Governor McDonnell to the detriment of Schneider and the citizens of Virginia.

was appointed to investigate possible felony violations for the misuse of public assets by the McDonnells and the Governor's Administration.

DISMISSAL IS THE APPROPRIATE REMEDY

After failing to consider the extent and scope of the conflicts of interest and misstating the facts of the information provided by Todd Schneider, the Commonwealth's argument concerning the appropriate remedy for the admitted conflict of interest is inadvertently misleading. The Commonwealth asserts that case law supports the position that recusal is the appropriate remedy by citing cases in which the court did not have the authority to dismiss the indictments (such as cases involving writs of prohibition, or habeas proceedings challenging custody) and ignoring the actual discussion of law and facts in the cases it cites.

In Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985) (Attachment C), the issue involved the conflict of a private prosecutor who assisted the public prosecutor in the case. As the court noted, private prosecutors "may not initiate a prosecution or appear before a grand jury . . . and may take no part in a decision to engage in plea bargaining, or a decision to accept a plea of guilty to a lesser crime or enter a *nolle prosequi*." 229 Va. at 393, 329 S.E.2d at 26 (internal citations omitted) The important distinction in Cantrell is that the prosecutor with the conflict (the private prosecutor) had no role in the initiation of the prosecution. That being the case, his conflict in Cantrell did not taint the indictment, and the Supreme Court focused its discussion on the role of the conflicted (private) prosecutor at trial. 229 Va. at 391, 329 S.E.2d at 25. Therefore, dismissal of the indictment would not have been warranted in Cantrell.

In Nicholas v. Sammons, 178 W.Va. 631, 363 S.E.2d 516 (1987)(Attachment D), a West Virginia case cited by the Commonwealth, the Court did *not* "[hold] that the correct remedy for a

conflict of interest on the part of a prosecutor – whether before trial or on appeal – is removal of the prosecutor from the case.” (Commonwealth’s Brief at p. 3) The case involved a writ of prohibition in which the defendant was seeking to disqualify the prosecutor.⁵ The Court discussed the law holding that removal *may* be based on a conflict of interest, but it did *not* hold that removal is the *only* remedy and it did *not* address in any way whether dismissal of the indictment may be the appropriate remedy in a case. The Commonwealth’s representation of the holding of this case is completely misleading.⁶

In Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967)(Attachment E), a federal appellate habeas proceeding challenging the state’s custody of the petitioner, the Fourth Circuit affirmed the judgment of the district court granting the writ and vacating the criminal sentence. The court *did not* address whether dismissal of the indictments was the appropriate remedy since the *only* issue before the court was the district court’s decision to vacate the sentence (thereby releasing the petitioner from custody). Although it cites this case, the Commonwealth ignores the important discussion of the role of prosecutors and the due process requirement of impartiality. As the court summarized, due process is denied when the conflict of interest means the prosecutor “was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge . . . , or (3) whether to recommend a

⁵ The petitioner in Nicholas could not have requested the dismissal of the indictment upon a writ of prohibition. “The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act” United States v. Hoffman, 71 U.S. 158 (1866).

⁶ The actual holding of the case was that the petitioner failed to establish that the prosecutor’s occasional filing of suits on behalf of the bank constituted the kind of close ties that would impact his impartiality and warranting disqualification.

suspended sentence or other clemency.” 379 F.2d at 713. This case does *not*, as asserted by the Commonwealth, “show that dismissal is not an appropriate remedy for a prosecutor’s conflict of interest” (Commonwealth’s Brief at p. 5), but it clearly shows that the active conflicts of interests affecting the OAG from at least March, 2012, meant that Todd Schneider was denied due process. The OAG was not in position to exercise fair-minded judgment as to “whether to decline to prosecute.”

The only other case cited by the Commonwealth as supporting its argument that dismissal of the indictments is not an appropriate remedy for due process violations arising from conflicts of interest is Lux v. Commonwealth, 24 Va. App. 561, 484 S.E.2d 145 (1997)(Attachment F). The Commonwealth incorrectly characterizes this case as a “habeas corpus proceeding following the revocation of a defendant’s suspended sentence” (Commonwealth’s Brief at p. 4). The case was actually the direct criminal appeal of the revocation decision. Lux did not “mov[e] for a writ of habeas corpus on the sentence revocation” (Commonwealth’s Brief at p. 4), but appealed the judgment in the revocation proceeding and argued on appeal that the trial court improperly denied his motion to disqualify the Commonwealth’s Attorney “from prosecuting the motion to revoke appellant’s suspended sentence” based on a conflict of interest. 24 Va. App. at 567, 571-572, 484 S.E.2d at 148, 150. The case did not involve a challenge to the prosecutor’s impartiality before indictment, but in a post-sentencing proceeding. The Court of Appeal noted that the conflict of interest existed prior to the initiation of the revocation proceeding and reversed the order of the trial court revoking the suspended sentence. 24 Va. App. at 575-576, 484 S.E.2d at 152. Any subsequent proceedings on remand logically would have to be initiated by an impartial prosecutor upon a new motion to revoke the suspended sentence to remedy the

due process violation. Although not involving an indictment, Lux actually supports dismissal of the indictment if the conflict existed prior to the initiation of proceedings.

GRAND JURY PROCEEDINGS

The Commonwealth has conceded that the OAG had a conflict of interest and that Todd Schneider has alleged that the OAG had improper motives in seeking indictments against him, but the Commonwealth claims that Schneider has not alleged that “the OAG committed any misconduct before the grand jury that handed down the indictments.” This claim is misleading. The defendant has clearly, and repeatedly, asserted that the OAG had improper motives in seeking the indictments and was laboring under conflicts of interest when it made the decision to charge Todd Schneider with a crime. The decision to send a witness to the grand jury to get an indictment - rendered when the OAG had conflicts of interest and could not exercise fair-minded judgment – was the misconduct. The sole summary witness who appeared before the Multi-Jurisdictional Grand Jury did not walk into the grand jury room just because he wanted to – he was *called* as a witness before the grand jury because the OAG made the decision to charge and generated the bills of indictment to present to the grand jury. That the OAG directed the witness’s presence before the grand jury **was** misconduct.

Additionally, the Commonwealth’s brief on this point is misleading because the defendant is not required to prove misconduct before the grand jury to establish a denial of due process rights from a conflicted prosecutor. Prosecutorial misconduct before the grand jury is a separate and distinct issue.⁷ The issue in this case is not what evidence was presented to the

⁷ For this reason, Section V of the Commonwealth’s Brief contained in the sealed document captioned “Commonwealth’s Sealed Annex to its Brief in Opposition to Defendant’s Motion to Dismiss,” which discusses the appearance of the witness before the multi-jurisdictional grand

grand jury. An impartial prosecutor would likely have presented completely different evidence. The primary issue is the wrong in deciding to charge the defendant – the decision *to involve a grand jury at all*.

When an impartial prosecutor decides to involve a grand jury, the next question is what evidence or witnesses the impartial prosecutor will decide to present. Even before those decisions are made, an impartial prosecutor would have conducted an impartial investigation to obtain all of the facts necessary to make the correct decision. Each of these decisions, how and what to investigate, whether to ask a grand jury to charge, and what evidence to provide to the grand jury was made by the OAG while it had irreconcilable conflicts of interest.

As the cases cited by the Commonwealth state, an accused has a constitutional right to an impartial prosecutor to exercise fair-minded judgment with respect to “whether to decline to prosecute” Ganger, 379 F.2d at 713, and “[a] conflict of interest on the part of the prosecution in itself constitutes a denial of a defendant’s due process rights” Cantrell, 229 Va. at 394, 329 S.E.2d at 26-27. The defendant’s challenge is not based on irregularities in the grand jury proceedings, but based on the constitutional denial of due process rights arising from conflicts of interest affecting the exercise of prosecutorial discretion.

jury, is irrelevant. The defendant is entitled to an impartial prosecutor in addition to an impartial grand jury. The two issues are completely separate and having an impartial grand jury is not a “cure all” for the due process violations caused by a prosecutor laboring under conflicts of interest. Due process requires the involvement of a prosecutor with the ability “for the fair minded exercise of [his] discretion, including his options of whether to seek indictment, upon what charge, whether to plea bargain, and the possibility of a nol pros.” Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985)

The majority of the Commonwealth's argument in Sections II and III⁸ of the Brief is irrelevant. (Commonwealth's Brief at pp. 5-7) Only one case, dubbed "*Pease II*" by the Commonwealth, Pease v. Commonwealth, 39 Va. App. 342, 573 S.E.2d 272 (2002)(Attachment G), involved a claim that the prosecutor had a conflict of interest. In that case, Pease moved to dismiss the indictment because the Commonwealth's Attorney who obtained the indictment had conflicts of interests. 39 Va. App. at 347, 573 S.E.2d at 274. However, the court found that the prosecutor was impartial, so it did not address the appropriate remedy. At no point did the Court of Appeals suggest that the defendant had to establish irregularities in the grand jury proceedings to proceed on a due process challenge based on the prosecutor's conflict of interest, or that recusal is the only remedy for such a challenge. *Pease II* simply does not support the Commonwealth's arguments.

Like Pease, Todd Schneider has moved to dismiss the indictments obtained by a conflicted prosecutor. Unlike Pease, the Commonwealth has conceded that the OAG had a conflict of interest in Todd Schneider's case. For this reason, the entirety of Section III of the Commonwealth's Brief is also irrelevant.

⁸ This case does not involve a claim of "vindictiveness" and the Commonwealth's discussion of this line of case law is misleading. Todd Schneider has not alleged that the Commonwealth charged him with greater offenses because of his exercise of a clearly established right (such as appealing a conviction). Todd Schneider has not alleged that the OAG charged him to punish him for exercising a protected right, but to protect the OAG's personal, financial, political, and professional interests by shielding friends, political allies, and clients of the OAG from criminal investigation and scrutiny. The argument in Section III entirely misses the point.

Section IV is utterly irrelevant as well. Todd Schneider never claimed to be shielded from prosecution under the Whistleblower Protection Act. The Motion to Dismiss Indictments referenced the Act for its definition of "whistleblower," "wrongdoing," and "abuse" to describe the nature and content of Todd Schneider's debriefing with the OAG in March, 2012. During that debriefing, Mr. Schneider provided information on the misuse of state assets and other wrongdoing by state employees and others at the Mansion. Pages 5-10 of the Commonwealth's Brief address issues that simply are not involved in this case and are irrelevant.

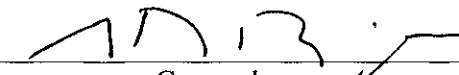
The OAG had conflicts of interest that existed for at least one year prior to its decision to seek a grand jury indictment. These conflicts, discussed *supra* and in the Motion to Dismiss Indictments filed April 29, 2013, were financial, personal, political, and professional. At a minimum, the attorney-client relationship of the OAG with the Governor and the Governor's Administration imposed a duty to protect those clients from criminal investigation and prosecution that conflicted with the OAG's duty to its other client, the Commonwealth, to impartially investigate information that those Executive Branch clients engaged in criminal activity, and to be impartial and ensure due process and justice for Todd Schneider. Instead of investigating the misuse of state assets that provided an impetus for the "trade agreement" established between Schneider and the Mansion, the OAG charged Schneider.

In the same vein, current counsel for the Commonwealth declines to address the extent of the conflicts in order to perpetuate the prosecution of Todd Schneider for merely accepting payment for his labor and services through a "trade agreement" arrangement orchestrated by the Governor's Administration to cover up the misuse of state assets that advanced the political and personal goals of the McDonnells.

Respectfully Submitted,

TODD SCHNEIDER

By


Counsel

Steven D. Benjamin, VSB#18772
Email: sbenjamin@benjamindesportes.com
Betty Layne DesPortes, VSB#34360
Email: bladesportes@benjamindesportes.com
BENJAMIN & DesPORTES, P.C.

P.O. BOX 2464
Richmond, VA 23218-2464
(804) 788-4444 (telephone)
(804) 644-4512 (fax)
Counsel for Defendant Todd Schneider

CERTIFICATE

I certify that a true and exact copy of this Reply was mailed, first class postage prepaid,
and sent by electronic mail this 1st day of July to the following:

Gregory D. Underwood, Commonwealth's Attorney
Gregory.underwood@norfolk.gov.
Brent A. Johnson, Chief Deputy Commonwealth's Attorney
Brent.Johnson@norfolk.gov
Ramin Fatehi, Assistant Commonwealth's Attorney
Ramin.Fatehi@norfolk.gov
Office of the Commonwealth's Attorney
800 East City Hall Avenue, Suite 600
Norfolk, VA 23510


Counsel

Steven D. Benjamin, VSB#18772
Email: sbenjamin@benjamindesportes.com
Betty Layne DesPortes, VSB#34360
Email: bldesportes@benjamindesportes.com
BENJAMIN & DesPORTES, P.C.
P.O. BOX 2464
Richmond, VA 23218-2464
(804) 788-4444 (telephone)
(804) 644-4512 (fax)
Counsel for Defendant Todd Schneider

City prosecutor investigating McDonnell's disclosures

BY JIM NOLAN *Richmond Times-Dispatch* | **Posted: Thursday, May 23, 2013 12:00 am**

At the direction of Attorney General Ken Cuccinelli, Richmond's top prosecutor has been investigating Gov. Bob McDonnell's statements of economic interest since November for possible violations of disclosure laws.

In early November, Cuccinelli sent a letter to Richmond Commonwealth's Attorney Michael N. Herring, appointing him to review McDonnell's statements. By law, elected officials are required to account for all gifts received in excess of \$50.

"I did what I have consistently tried to do as attorney general, which is to uphold the law impartially," Cuccinelli said in a statement Wednesday.

Cuccinelli said he "made a referral" to Herring "to conduct an investigation into possible violations of financial disclosure provisions, as information came to my attention that triggered my requirement to look into the matter."

He added: "My referral to Mr. Herring was not a conclusion that any violation occurred. Under the law, that conclusion will be made by Mr. Herring alone."

News of the investigation into McDonnell's statements of economic interest follows weeks of disclosures surrounding the governor and first lady Maureen McDonnell's relationship with Jonnie Williams Sr., the CEO of Henrico-based dietary supplement maker Star Scientific.

It also underscores the difficult nature of the relationship between two of Virginia's top elected officials.

Cuccinelli, a Republican, is running for governor. McDonnell, the titular head of the state Republican Party who has been mentioned as a possible presidential candidate in 2016, is supporting the attorney general and helping to raise money for him.

In response to a Freedom of Information Act request for correspondence between the attorney general's office and Richmond Commonwealth's Attorney Office, which the *Richmond Times-Dispatch* filed last week, Herring says:

"In that letter, the attorney general designated me, pursuant to Virginia Code Section 2.2-3126(A) (2), to review certain Statements of Economic Interest filed by the governor."

<http://www.timesdispatch.com/news/state-regional/government-politics/city-prosecutor-in> 6/26/2013

MTD REPLY ATTACHMENT B

That section of the Virginia Code outlines the responsibility of the attorney general as the sole official charged with the initial enforcement function with regard to disclosures required by certain state officers and employees.

It states: "If he determines that there is a reasonable basis to conclude that any officer or employee serving at the state level of government has knowingly violated any provision of this chapter, he shall designate an attorney for the commonwealth who shall have complete and independent discretion in the prosecution of such officer or employee."

In his response to The Times-Dispatch FOIA request, Herring says he will not provide the letter Cuccinelli sent requesting the investigation "because I believe it constitutes 'criminal investigative file' material."

Herring adds: "For future reference, I will not disclose the content, substance or results of my review until it is complete, and only then through due process and in accordance with the law."

Tucker Martin, a spokesman for McDonnell, said, "We are aware of the review and look forward to working with them as this process moves forward."

McDonnell's lawyer, former Attorney General Anthony F. Troy, had no immediate comment.

Last month, Cuccinelli asked Herring to investigate his own statements of economic interest after the attorney general admitted he had omitted some gifts from his financial disclosure forms for the previous four years, including roughly \$5,000 in gifts from Williams that included a catered Thanksgiving dinner and vacation stay at Williams' Smith Mountain lake home.

Cuccinelli said April 26 that he had amended his forms to reflect the additional gifts, which raised the total he had received from Williams and Star Scientific since 2009 to more than \$18,000.

A spokesman for the Democratic Party of Virginia said Wednesday that Herring's investigation of McDonnell calls attention to Cuccinelli's own lapses on financial disclosure.

"It is inexcusable for Cuccinelli to use the fact that it was his responsibility to investigate his own financial disclosure statements to avoid an investigation for six months after he began the investigation into the governor's statements," Brian Coy said.

Brian Gottstein, a spokesman for the attorney general's office, said Cuccinelli had nothing to report to Herring until Cuccinelli reviewed his own records in April.

Herring's probe of McDonnell also unfolds against the backdrop of a pending felony embezzlement case against Todd Schneider, chef at the Executive Mansion from 2010 to 2012.

In early 2012, Schneider told FBI, Virginia State Police and the attorney general's office that he had evidence of "wrongdoing" and "abuse" by the McDonnells in their use of state resources. He also provided information about their relationship with Williams.

Williams and his company have donated more than \$100,000 to McDonnell and his political action committee, Opportunity Virginia, in cash contributions and airfare on Williams' private jet. He has also showered the first family with thousands of dollars worth of gifts — including use of a Smith Mountain Lake vacation home and a \$15,000 check to cover the catering at the June 2011 Executive Mansion wedding of McDonnell's daughter, Cailin.

The governor has refused to say whether he or his family has received any gifts from Williams or others that he has not included in his disclosure statements.

There is no criminal penalty for accidentally failing to disclose a gift, knowingly failing to disclose a gift is considered a misdemeanor.

Authorities are also probing whether McDonnell provided Williams or Star any special consideration in his role as governor in exchange for the gifts Williams provided to the first family.

McDonnell has said Williams and his wife are personal friends, but the governor has steadfastly denied that he or his administration gave Star Scientific and Williams any special treatment.

In his own letter to Herring requesting an investigation of his filings, Cuccinelli said: "I have discovered some shortcomings in my own disclosures.

"None of my initial filings were knowingly wrong, rather, I did not give adequate attention to some of the details in the statements I filed on those occasions."

Cuccinelli amended his disclosure forms and divested his holding of Star Scientific stock, which he had also failed to initially disclose, claiming that he did not realize his holdings in the company exceeded the \$10,000 threshold for reporting of investments required by law.

Herring's investigation of Cuccinelli's own economic interest forms continues. The attorney general's involvement with Williams has already forced him to recuse his office from handling a lawsuit filed by Star Scientific against the state over a long-disputed \$700,000 tax assessment in Mecklenburg County.

Citing conflicts with potential witnesses in the case that it technically represents as state employees, Cuccinelli's office was also allowed by Richmond Circuit Court Judge Margaret P. Spencer to withdraw from its prosecution of Schneider, who goes on trial Oct. 15, three weeks before Election Day.

Schneider's attorneys have argued that Cuccinelli's relationship with Williams and McDonnell during the time when Schneider was providing information to authorities regarding mansion operations and the governor constitute grounds for dismissal of the charges. Arguments on that motion will be heard July 8.

jnolan@timesdispatch.com

(804) 649-6061

229 Va. 387, *, 329 S.E.2d 22, **;
1985 Va. LEXIS 217. ***

William Jeffery Cantrell v. Commonwealth of Virginia
Record No. 840269
Supreme Court of Virginia
229 Va. 387; 329 S.E.2d 22; 1985 Va. LEXIS 217
April 26, 1985, Decided

PRIOR HISTORY: [***1] Appeal from a judgment of the Circuit Court of Wise County. Hon. M. M. Long, Jr., judge presiding.

DISPOSITION: *Reversed and remanded.*

HEADNOTES

Criminal Procedure – Privately Retained Prosecutor – General Principles – Conflict of Interest – Due Process – Evidence – Expert Medical Testimony – Hypothetical Question Requirement – Jury Instructions – Circumstantial Evidence – Motive for Crime

Defendant's wife was killed by two shotgun blasts in December, 1981. The wife's parents retained a lawyer to "help to get [defendant] convicted." The private lawyer took the leading role at trial, with witnesses, motions, objections, and closing argument. The private lawyer also represented the victim's parents in a civil action seeking to have custody of defendant's child transferred to them as grandparents.

At trial the court excluded medical testimony offered by defendant to the effect that in a small fraction of instances, a serious head injury as claimed by defendant is not accompanied by a visible external indication of trauma. A defense objection was also lodged to the jury instruction with respect to proof of motive in a case supported principally by circumstantial [***2] evidence.

1. Private retained prosecutors are an historic practice, approved in many earlier Virginia cases.

2. Abolition of privately retained prosecutors is a matter for legislative judgment.

3. The right of the crime victim or family to retain a private prosecutor is subject to discretion of the trial court.

4. Privately retained prosecuting attorneys are bound by the same standards applicable to public prosecutors.

5. Privately retained prosecuting attorneys may not initiate prosecutions or appear before a grand jury.

6. Privately retained prosecuting attorneys may appear at trial with permission of the court and consent of public prosecutor, and may deliver a closing argument only with court permission.

7. Privately retained prosecuting attorneys may not participate in a plea bargain.

8. Privately retained prosecuting attorneys may not assume control of the case, which rests continuously with the public prosecutor.

9. A lawyer representing the crime victim or family in a civil action arising out of the occurrence giving rise to the prosecution necessarily has a conflict of interest, and like a part-time public prosecutor, may not represent [***3] both the victim or family and the public in a prosecution.

10. The inherent conflict of interest in representing a crime victim or family in a civil action and prosecuting the criminal proceeding denies a defendant rights of due process under *Art. I, § 11 of the Constitution of Virginia*, and cannot be held harmless error.

11. The trial court committed error in excluding defense medical expert testimony that a blow to the head sufficient to cause someone to fall down and pass out need not leave external evidence of trauma, because the hypothetical format need not be used where the expert testifies to facts in his own knowledge. *Code § 8.01-401.1 (1982), applied.*

12. The weight of medical expert evidence discussing probabilities is for the jury to determine, where evidence was not speculative and was not couched in terms of mere possibilities.

13. In circumstantial evidence cases, those items proven with respect to time, place, motive, means and conduct must *concur* in pointing to the defendant as perpetrator.

14. Proof specifically directed to individual elements such as motive need not be presented, and an instruction in a circumstantial case which [***4] advised the jury that "the Commonwealth does not have to prove a motive for the killing. The presence or absence of a motive may be considered in arriving at your verdict," was correct.

SYLLABUS

Conviction for shotgun murder of wife reversed where the victim's parents retained an attorney to assist prosecutor and also retained him to pursue a civil action to have custody of defendant's only child assigned to them, creating a conflict of interest; medical expert opinion and

circumstantial evidence principles also discussed.

COUNSEL: *John C. Lowe (S. Strother Smith, III; Lowe & Jacobs, Ltd., on brief), for appellee.*

John H. McLees, Assistant Attorney General (Gerald L. Baliles, Attorney General, on brief), for appellee.

JUDGES: Russell, J., delivered the opinion of the Court. Stephenson, J., concurring in part and dissenting in part.

OPINION BY: RUSSELL

OPINION

[*389] [**23] After an earlier trial had ended in a hung jury, William Jeffery Cantrell was convicted of the first-degree murder of his wife, Judy, and of the use of a firearm in the commission of the murder. The second jury fixed punishment at life imprisonment for murder, plus one year on the firearm charge. [***5] We granted him an appeal limited to three issues: whether his due process rights were infringed when private counsel, employed by the victim's family, played the dominant role in the prosecution; whether the court erred in excluding expert medical opinion testimony proffered in support of the defense theory of the case; and whether the court erred in instructing the jury with respect to the necessity for proof of malice.

The evidence was entirely circumstantial. Judy Cantrell was killed by two shotgun blasts as she was climbing the steps toward the side door of the Cantrell home, about 9:00 p.m. on December 8, 1981, while returning alone from a karate class. Her husband, the defendant, was at home, but [**24] the couple's only child was visiting the defendant's parents, who lived next door. The shotgun belonged to the defendant and was kept in the home.

Within a few minutes after the shotgun blasts were heard, the defendant called his parents' home for help. The rescue squad arrived soon thereafter and found Judy dead at the foot of the steps, outside the home, and the defendant lying unconscious. He was taken to the Norton Community Hospital where he recovered consciousness [***6] but was hysterical, incoherent, and hyperventilating. His blood pressure was elevated and his face flushed. He had superficial facial scratches and an inconspicuous bruise on the forehead. There were no marks on the back of the head and no signs of serious head injury.

The defendant gave a statement to the police in which he said that he had entered his home about 6:40 p.m., thinking that nobody was present. He said that as he entered the kitchen, he was "struck over the head by a hard object with much force," and was seized by three persons whom he could not identify. He said that he "passed out," and when he "came to," his hands and legs

were tied, he was face down on the linoleum floor of the kitchen, and a large man was sitting on his back. He said that he was hit on the head several times with a hard object, that the assailants would frequently "bang [his] head on the floor," that a water glass was broken on the back of his head, and that he was kicked in the stomach. He testified that he heard sounds indicating that the [*390] house was being ransacked and then heard his wife's car pull into the carport. He called out to warn her, but was again hit over the right [***7] ear and on the back of the head with a hard object, after which he heard two shotgun blasts. He said he then heard the perpetrators gathering up the goods they had stolen from the house and running out the back door. He eventually freed himself from his bonds, found his wife dead of shotgun wounds at the foot of the steps leading to the side door, called his parents for help, and "after going into shock, woke up at Norton Community Hospital."

The police found the Cantrell home in disarray, but many items of value, including Judy's rings, a camera, and several firearms, were undisturbed. The defendant gave the police a list of items missing from the home. These items were found in a field on the Cantrell property. Although rain and snow fell that night, a tracking dog was brought to the scene about three hours after the murder. The dog found a scent leading from the back of the house to a boundary fence around the field in which the missing items were recovered, but found no trail leading away from the property. Instead, the dog returned to the house. A palm print found inside the house belonged neither to the defendant nor to Judy, but no other fingerprints were recovered [***8] at the scene, on the shotgun, or on the items found in the field. A soil sample taken from a bathroom window sill matched soil behind the house, but was different from samples taken from defendant's shoes. A broken drinking glass was found on the kitchen floor.

Four months after the murder, a Wise County deputy sheriff received an anonymous telephone call in which a man with a voice which sounded "similar" to the defendant's suggested that a search of a planter box outside a hardware store in the town of Pound would reveal evidence which would convict another man of the crime. Under newly disturbed soil in the planter box, the deputy found a pistol and underwear from the Cantrell home and two old photographs of Judy. A witness testified that he had seen the defendant in Pound, near the flower box, three days before the anonymous call was received.

The Commonwealth introduced evidence that the defendant, at the time of the murder, had been conducting an adulterous relationship for a year with a married woman. Both parties to the relationship professed continuing devotion to their respective spouses and a strong desire to preserve their marriages.

[*391] Carl McAfee, [***9] a lawyer in private practice in Wise County, was employed by the parents [**25] of Judy Cantrell to "help to get Jeff Cantrell convicted." Judy's father testified that he incurred fees due to Mr. McAfee amounting to \$ 10,000.00 for these services. Mr. McAfee testified that he had not been formally appointed as a special prosecutor or as an assistant Commonwealth's Attorney, was not being paid by the Commonwealth, and had not taken any oath of office. He frankly informed the jury on voir dire that he was "employed by [Judy's parents]" to "assist the Commonwealth." In closing argument, he stated, "I am speaking to you in behalf of the Commonwealth as a Special Prosecutor for the family of Judy Cantrell. . . ." Although the Commonwealth's Attorney was present throughout the trial and took an active role, Mr. McAfee was clearly lead counsel. He examined most of the witnesses, made and responded to most of the motions and objections, and made the closing argument to the jury.

Judy Cantrell's father had also retained Mr. McAfee in a civil case to seek a change of custody of the Cantrells' only child from the defendant to Judy's parents. The defendant argues that this employment [***10] gave Mr. McAfee a conflict of interest which rendered his participation in the criminal prosecution improper to a degree which denied the defendant due process of law. The defendant points out that Mr. McAfee's task in obtaining the child's custody for his clients, the child's grandparents, would be greatly facilitated if the defendant were convicted of murder. Further, the defendant argues that a murder conviction would bar his right to inherit from his deceased wife and would set the stage for a wrongful death action against him, all to the benefit of Mr. McAfee and his civil clients. Thus, he contends, the private prosecutor had an incentive, which the Commonwealth's Attorney lacked, to secure his conviction for reasons other than the impartial administration of justice. The defendant argues: "[t]he fact that there should need to be argument to the jury that the prosecution was biased because it was bought with private money for private vengeance creates entirely the wrong atmosphere for a criminal trial." He points out that the role of privately employed prosecutors developed during a time when Commonwealth's Attorneys were not required to be members of the bar. The defendant [***11] argues that, since the adoption of statutory amendments requiring bar membership for Commonwealth's Attorneys, Code §§ 15.1-40.1 [*392] and 24.1-86, all justification for private prosecutors has been eliminated.

[1] The right of a citizen to hire a private prosecutor is rooted in the early common law of England. Criminal prosecutions, like civil actions, were conducted within the framework of a pure adversary system. The Crown

did not provide a public prosecutor in routine felony cases; rather, the victim or his family retained private counsel to prosecute and the defendant retained counsel to defend. *State v. Atkins*, 261 S.E.2d 55, 57 (W.Va. 1979), cert. denied, 445 U.S. 904 (1980). See generally Note, *Private Prosecution -- The Entrenched Anomaly*, 50 N.C.L. Rev. 1171 (1972). We have approved the practice, expressly or by implication, in many of our earlier cases. *McCue's Case*, 103 Va. 870, 1004, 49 S.E. 623, 630 (1905); *Jackson's Case*, 96 Va. 107, 112, 30 S.E. 452, 453 (1898); *Sawyers v. Commonwealth*, 88 Va. 356, 357, 13 S.E. 708, 708 (1891); *Hopper, Stiers and Lemmon's Case*, 47 Va. (6 Gratt.) 684, 685 (1849). Only one conviction [***12] has been reversed because of the participation of a private prosecutor, *Compton v. Commonwealth*, 163 Va. 999, 1004-06, 175 S.E. 879, 882 (1934), but the reversal was ordered not because the private prosecutor appeared, but rather because he was in fact employed by the clerk and the sheriff, whose duty was to serve the court impartially.

[2] The policy arguments advanced by the defendant for a total prohibition of privately employed prosecutors may have a sound basis in considerations of public policy, but we think it advisable to leave to the General Assembly such a basic change in the long-established common law of Virginia. [**26] Nevertheless, without disturbing the common-law rule which generally permits the appearance of private counsel to assist the prosecution, we conclude that Mr. McAfee's role, in the circumstances of this case, infringed the defendant's right to a fair and impartial trial.

[3-4] The common-law right of a crime victim, or of his family, to assist the prosecution with privately employed counsel is not absolute, but lies within the discretion and continuing control of the trial court. *State v. Atkins*, 261 S.E.2d at 58-59. A private [***13] prosecutor is subject to the same high standard of conduct in the trial of the case as is a public prosecutor. *State ex. rel. Moran v. Ziegler*, 244 S.E.2d 550 (W.Va. 1978). It follows, in our view, that he is absolutely prohibited from taking any position, making any argument, offering any evidence, or advocating any cause which would be forbidden to a public prosecutor.

[*393] [5-8] His role is more limited than that of the public prosecutor. By the weight of authority, he may not initiate a prosecution or appear before the grand jury. *Nichols v. State*, 17 Ga. App. 593, 87 S.E. 817 (1916); *Flege v. State*, 93 Neb. 610, 142 N.W. 276 (1913); he may appear only by leave of the trial court, *State v. Davis*, 203 N.C. 13, 26, 164 S.E. 737, 744 (1932); he may participate only with the express consent of the public prosecutor, *State v. Bartlett*, 105 Me. 212, 74 A. 18 (1909); he may make a closing jury argument only in the court's discretion, *Sawyers v. Commonwealth*, 88 Va. at

357, 13 S.E. at 708; and he may take no part in a decision to engage in plea bargaining, deciding the terms of a plea bargain, or a decision to accept a plea of [***14] guilty to a lesser crime or to enter a *nolle prosequi*, see *Ganger v. Peyton*, 379 F.2d 709, 712-13 (4th Cir. 1967). Although there is no arbitrary limitation as to the proportion of work which may be done by a private prosecutor, *State v. Atkins*, 261 S.E.2d at 59, the public prosecutor must remain in continuous control of the case, *State v. Moose*, 310 N.C. 482, 489, 313 S.E.2d 507, 512-13 (1984).

We said in *Macon v. Commonwealth*, 187 Va. 363, 373, 46 S.E.2d 396, 401 (1948), that it is as much the duty of a Commonwealth's Attorney to protect his fellow citizens from unjustified prosecutions as it is to prosecute the guilty. His duty is "to seek justice, not merely to convict." Virginia Code of Professional Responsibility EC 8-10, Vol. 11, Code of Virginia at 258 (1984 added volume).

[9] A lawyer who represents the victim of a crime, or the victim's family, in a civil case arising out of the occurrence which gives rise to a criminal prosecution, for which he is hired as a special prosecutor, necessarily incurs a conflict of interest. He cannot serve two masters. His duty to administer the criminal law impartially, in the interest of justice, is [***15] essentially a judicial one. *Griffin v. U.S.*, 295 F. 437, 439-40 (3d Cir. 1924). He also has undertaken a duty to represent the interests of his civil client with undivided fidelity and zeal. The likelihood of conflict between these two duties rises to the level of an overwhelming probability.

Examined from another viewpoint, the private prosecutor is prohibited, as stated above, from advocating any cause which would be forbidden to the public prosecutor. Even in jurisdictions in which the Commonwealth's Attorney is permitted to engage in the part-time practice of law he may not undertake the civil representation [***16] of a victim, or the family of a victim, of a crime whose perpetrator he must prosecute. See DR 8-101A(2), Vol. 11, Code of Virginia, at 256 (1984 added volume); see also Legal Ethics Opinions 236, 268, 285, 303, and 351, Va. State Bar Prof. Handbook (1984 ed.); see also *Ganger v. Peyton*, 379 F.2d at 712.

[10] We agree with the *Ganger* court that the position of a private prosecutor having a civil interest in the case so infects the prosecution with the possibility that private vengeance has been substituted for impartial application [***16] of the criminal law, that prejudice to the defendant need not be shown. A conflict of interest on the part [***27] of the prosecution in itself constitutes a denial of a defendant's due process rights under art. I, § 11 of the Constitution of Virginia, and cannot be held harmless error. See *Ganger*, 379 F.2d at 714.

Although the foregoing holding requires reversal, we shall briefly discuss the defendant's two remaining assignments of error because the case may, if the Commonwealth be so advised, go to trial for a third time.

The defendant, as noted above, gave a statement to a deputy sheriff that he had been struck on the head with a hard object, and had "passed out;" that he had received numerous other blows to the head and that a water glass had been broken by a blow to the back of his head. In opening statement at trial, the prosecution, after describing the defendant's statement, indicated that it would show the improbability of the defendant's version by producing evidence that when admitted to the hospital on the night of the murder, the defendant had only a "slight bruise on the front of his head, a little reddish place, and that will be all the testimony about [***17] his physical condition with regard to the alleged beatings and bangings and knocking out blow he received to the head."

In order to counter this attack and to corroborate his version, the defendant called as an expert witness Dr. Clelland Blake, a forensic pathologist from Tennessee, who testified that he had examined many head injuries. Defense counsel, referring to defendant's statement to the sheriff, asked: "Let me refer to the statement where it said he was hit in the head, and ask you if a person were hit in the head hard enough to knock him down and to cause him to become unconscious, would that necessarily cause any lumps on the head?" The Commonwealth objected to the question "unless he saw the defendant and unless he has had an opportunity [***18] to examine him." The court sustained the objection. Thereafter, defense counsel made three further efforts to rephrase the question, but each was held objectionable. In the jury's absence, the defense proffered Dr. Blake's opinion that while there is, more often than not, "some evidence of an external trauma," a smaller percentage, "perhaps ten to fifteen or twenty percent of the blows to the head don't show external injury." [***18] He stated that some blows showing no external injury can be fatal. He explained, "many times we see cases with no external evidence in a particular location, but upon opening the head [during autopsy], we find unexpected hemorrhage and injury."

The defendant assigns error to the exclusion of this evidence, and argues that it was not harmless error because, in closing argument, the prosecution stated to the jury:

And it doesn't take any Dr. Blake . . . to tell reasonable men and women that if you hit somebody that hard . . . hard enough in the back of the head, you are going to leave something. You are going to leave a knot, you are going to take a

229 Va. 387, *, 329 S.E.2d 22, **:
1985 Va. LEXIS 217. ***

gash out, you are going to leave something on the back of that man's head . . . when you hit somebody hard enough to knock them down on the floor, you are going to do a little bit of damage.

The Attorney General responds that the questions to Dr. Blake were not propounded in correct hypothetical form, and that the answers dealt only with possibilities, rather than reasonable probabilities. Thus, he argues, the questions failed to meet the test of *LeVasseur v. Commonwealth*, 225 Va. 564, 587-88, 304 S.E.2d 644, [***19] 656-57 (1983), and *Spruill v. Commonwealth*, 221 Va. 475, 479, 271 S.E.2d 419, 421 (1980), and the answers were not probative of defendant's theory of the case.

[11-12] In our view, it was error to exclude the proffered testimony. Hypothetical questions are unnecessary where an expert testifies from his own knowledge of the facts disclosed in his testimony, *Walrod v. Matthews*, 210 Va. 382, 388, 171 S.E.2d 180, 185 (1969), or, since 1982, where he renders an opinion "from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial." *Code* § 8.01-401.1 (1982 [**28] Acts, c. 392). The testimony was relevant because it tended to establish the probability or improbability of a fact in issue. *Va.* [***96] *Real Estate Comm. v. Bias*, 226 Va. 264, 270, 308 S.E.2d 123, 126 (1983). Its weight was for the jury to determine. *Id.* It was not speculative, and did not, in itself, deal with possibilities rather than probabilities. Rather, it was offered to furnish the jury with empirical data available in the discipline of pathology, and thus to enable the jury to determine the degree of probability for itself. [***20] It did not, as the Commonwealth argued to the jury, impart matters of common knowledge. The jury was free to disregard it or to give it little weight, but was entitled to hear it. See C. Friend, *The Law of Evidence in Virginia* § 216 (2d ed. 1983).

Over the defendant's objection, the court instructed the jury: "To prove the charge of murder the Commonwealth does not have to prove a motive for the killing. The presence or absence of a motive may be considered in arriving at your verdict." The defendant concedes that such an instruction is proper in cases where direct evidence, or the defendant's admissions, furnish proof that he was the criminal agent, or even where the evidence, although circumstantial, entirely excludes the possibility of any other criminal agent. The defendant argues, however, that proof of motive is required in cases, such as his, where the prosecution seeks to prove the identity of the criminal agent by purely circumstantial evidence, which does not completely exclude the possibility that another person was the perpetrator.

In support of this proposition, the defendant relies on a line of our decisions dealing with circumstantial evidence, going back [***21] to *Dean's Case*, 73 Va. (32 Gratt.) 912 (1879), where we said: "Here, then, we have a case of circumstantial evidence, where *time, place, motive, means* and *conduct* concur in pointing out the accused as the perpetrator of the crime. When these concur . . . the evidence is powerfully strengthened by the total absence of any trace or vestige of any other agent." *Id.* at 926 (emphasis in original) (citation omitted). In *Abdell v. Commonwealth*, 173 Va. 458, 470, 2 S.E.2d 293, 298 (1939), we followed *Dean*, but stated the proposition more generally: "The burden is upon the Commonwealth, where circumstantial evidence is relied upon to support a conviction, to show that 'time, place, motive, means and conduct concur in pointing out the accused as the perpetrator of the crime.'" Similar language has been employed in many circumstantial evidence cases. As recently as *Bishop v. Commonwealth*, 227 Va. 164, 313 S.E.2d 390 (1984), we said:

[*397] We are guided by familiar principles. Where the evidence is entirely circumstantial, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and must exclude every reasonable [***22] hypothesis of innocence. The chain of necessary circumstances must be unbroken. The circumstances of motive, time, place, means, and conduct must all concur to form an unbroken chain which links the defendant to the crime beyond a reasonable doubt. *Stover v. Commonwealth*, 222 Va. 618, 623, 283 S.E.2d 194, 196 (1981); *Inge v. Commonwealth*, 217 Va. 360, 228 S.E.2d 563 (1976).

Id. at 169, 313 S.E.2d at 393.

The defendant misapplies these principles by confusing the species of circumstances which may or may not be available for proof in any given case, with the elements of the crime, which must each be proved in every case if a conviction is to be had. Intent, for instance, is a requisite element in many crimes, but motive is not. Motive is merely a circumstance tending to prove the guilt of the alleged perpetrator, as its absence may tend to show his innocence. It is relevant and probative on the issue of identity of the criminal agent, but it is not an element of any crime. "Motive and intent are not synonymous. Motive is the inducing cause, while intent is the mental state with which the criminal act is committed The prosecution is never [***23] required to prove motive, although it may do so." C. Torcia, *Wharton's Criminal Evidence* § 170 (13th ed. 1972); P.

229 Va. 387, *, 329 S.E.2d 22, **: 1985 Va. LEXIS 217. ***

Herrick. Underhill's Criminal Evidence §§ 54 and [**29] 644 (5th ed. 1957). Motive has never been a requisite element of the crime of murder in Virginia, *Van Dyke v. Commonwealth*, 196 Va. 1039, 1046, 86 S.E.2d 848, 852 (1955); *Thomas v. Commonwealth*, 186 Va. 814, 819, 44 S.E.2d 365, 368 (1947); *Ferrell v. Commonwealth*, 177 Va. 861, 873-74, 14 S.E.2d 293, 298 (1941); *Sutton v. Commonwealth*, 85 Va. 128, 135, 7 S.E. 323, 326-27 (1888), or in any other jurisdiction of which we are aware, C. Torcia, Wharton's Criminal Law § 137 (14th ed. 1979).

Our circumstantial evidence decisions do not require that each of the five circumstances of time, place, motive, means, and conduct must individually be proved beyond a reasonable doubt. In *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982), we observed that circumstantial evidence comes in infinite variety, [**398] and that it is unnecessary to create artificial rules as to the species of circumstantial evidence which a jury may consider. *Id.* at 228, 294 S.E.2d at 890. [***24]

[13] What our circumstantial evidence cases do stand for is the proposition that those circumstances which *are* proved must each be consistent with guilt and inconsistent with innocence, and that they must also be consistent with each other, that is to say, they must *concur* in pointing to the defendant as the perpetrator beyond a reasonable doubt.

[14] The defendant, relying on the above-quoted language which we used in *Bishop*, *Stover*, and *Inge*, emphasizes the phrases "all necessary circumstances" and "the chain of necessary circumstances must be unbroken," to argue that each of the five circumstances mentioned is essential. That reading joins the two phrases out of context. The first phrase, in its entirety, was: "all necessary circumstances *proved* must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence" (emphasis added). Thus it is apparent that not all of the listed circumstances must be proved in every case.

The distinction is best shown by the earliest case in which the general principle was stated. In *Sutton*, 85 Va. at 135, 7 S.E. at 326-27, the court instructed the jury: "[I]n all [***25] cases where the proof is circumstantial evidence, the time, place, means, opportunity, motive and conduct *or such of these facts as may be proved with other facts, if any*, must all concur in pointing out the accused beyond reasonable doubt as the guilty agent" (emphasis added). Counsel tendered the instruction without the italicized language, but the trial judge added it by interlineation. The defendant assigned error to the change. On appeal, we held: "This appears to have been a proper amendment. It is not necessary, for illustration,

to prove a motive. The crime may be clearly established and no motive ever discovered." *Id.* at 135, 7 S.E. at 326-27. We conclude that the jury was correctly instructed in the case before us.

For the reasons stated above, the judgment of conviction will be reversed and the cases remanded for further proceedings consistent with the views expressed herein, if the Commonwealth be so advised.

Reversed and remanded.

CONCUR BY: STEPHENSON (In Part)

DISSENT BY: STEPHENSON (In Part)

DISSENT

[**399] STEPHENSON, J., concurring in part and dissenting in part.

I concur in the result reached by the majority. I agree that the trial court erred in permitting [***26] the private prosecutor to act under the facts presented and in excluding the expert medical testimony. I cannot agree, however, that it was proper for the court to instruct the jury that "the Commonwealth does not have to prove a motive for the killing."

In many cases, this instruction is proper because, generally, motive is not an essential element of murder. *Ward v. Commonwealth*, 205 Va. 564, 570, 138 S.E.2d 293, 297 (1964). However, where, as here, the evidence is *wholly* circumstantial, "[t]he burden is upon the Commonwealth to prove beyond a reasonable doubt that [***30] *motive*, time, place, means, and conduct concur in pointing out the accused as the perpetrator of the crime." *Inge v. Commonwealth*, 217 Va. 360, 366, 228 S.E.2d 563, 568 (1976). (Emphasis added.) See also *Boykins v. Commonwealth*, 210 Va. 309, 312, 170 S.E.2d 771, 773 (1969); *Abdell v. Commonwealth*, 173 Va. 458, 470, 2 S.E.2d 293, 298 (1939).

This well-established rule has existed in the Commonwealth since *Dean's Case*, 73 Va. (32 Gratt.) 912 (1879). Twice recently, relying upon the rule reiterated in *Inge*, we reversed convictions in wholly circumstantial [***27] evidence cases. The most recent was *Bishop v. Commonwealth*, 227 Va. 164, 313 S.E.2d 390 (1984), where we said:

We are guided by familiar principles. Where the evidence is entirely circumstantial, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and must exclude every reasonable hypothesis of innocence. The chain of necessary circumstances must be unbroken. The circumstances of motive, time, place, means, and

229 Va. 387, *, 329 S.E.2d 22, **;
1985 Va. LEXIS 217, ***

conduct *must all concur to form an unbroken chain* which links the defendant to the crime beyond a reasonable doubt.

Id. at 169, 313 S.E.2d at 393. (Emphasis added.) (Citations omitted.)

The other case was *Stover v. Commonwealth*, 222 Va. 618, 283 S.E.2d 194 (1981), in which we stated:

We believe the evidence in the present case fails to measure up to the *Inge* standard. We said in *Inge* that, where the [*400] evidence is circumstantial, "all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence." We said further that "[t]he chain of necessary circumstances must be unbroken." . . . [***28] . . . We do not believe that the circumstances

of motive, time, place, means, and conduct *concur in this case to form an unbroken chain* linking the defendant to the murder . . . beyond a reasonable doubt.

The chain breaks down in its very first link. If the defendant's loss to Taylor [the victim] in the dice game can be considered sufficient motive for murder, . . . others than the defendant had a similar motive.

Id. at 623, 283 S.E.2d at 196. (Emphasis added.)

In the face of such clear, settled law, I believe that the instruction constituted reversible error, and that, upon remand, it should be refused. In my opinion, the majority has implicitly overruled this line of cases and repudiated a fair and logical rule that has served the Commonwealth well for over a century.

178 W. Va. 631, *; 363 S.E.2d 516, **;
1987 W. Va. LEXIS 633. ***

**Paul NICHOLAS v. Lucien R. SAMMONS, Jr., Prosecuting Attorney for Doddridge
County, and the Honorable Sam White, Judge, Third Judicial Circuit
No. 17919**

**Supreme Court of Appeals of West Virginia
178 W. Va. 631; 363 S.E.2d 516; 1987 W. Va. LEXIS 633
November 19, 1987, Filed**

PRIOR HISTORY: [***1] Prohibition.

DISPOSITION: Writ denied.

SYLLABUS

1. Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

2. "Under circumstances where it can reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting attorney should be disqualified from prosecuting the case." Syllabus Point 4, in part, *State v. Knight*, 168 W. Va. 615, 285 S.E.2d 401 (1981).

3. It is generally held that past representations of a victim on civil matters unrelated to the criminal charges involving the defendant ordinarily will not disqualify a prosecutor.

COUNSEL: Attorney for Plaintiff: Jerald E. Jones.

Attorney for Defendant: [***2] Silas B. Taylor, DAG.

JUDGES: Miller, Justice.

OPINION BY: MILLER

OPINION

[*631] [**517] The relator in this proceeding in prohibition, Paul Nicholas, was indicted by a grand jury in Doddridge County for obtaining money by false pretenses from the First National Bank of West Union. He seeks to disqualify the prosecuting attorney because he had previously represented the bank in civil matters, including title and collection work, and currently has outstanding loans and is a depositor of the bank. He also prays for the appointment of a special prosecutor.

The record in this proceeding indicates that Salem Pipe, Inc., a corporation, obtained a \$ 30,000 loan from First National Bank of West Union in May, 1984. The petitioner, Paul Nicholas, as President of Salem Pipe, executed a Security Agreement listing a piece of drilling equipment as security for the loan. Thereafter, the bank declared the loan in default. The prosecuting attorney

indicates that when he was contacted by the bank he referred the case to the state police which conducted an investigation. Based on this investigation, the relator was indicted for obtaining money under false pretenses in January, 1987. The indictment alleged [***3] that the relator had falsely stated the drilling equipment listed as security for the loan was owned by Salem Pipe.

In the proceedings here, the relator has raised as an additional fact in support of [*632] recusal, i.e., that the prosecutor represented another creditor against the relator in a civil action styled *McCormick and Balog v. Paul Nicholas and Salem Pipe, Inc.*, No. 84-C-14. In his response to this allegation, the respondent prosecutor avers that this civil action was dismissed under the "two-year" rule in September, 1986, over four months prior to the return of the initial indictment. Furthermore, he asserts that the civil action had no relationship whatsoever to the bank or to the transaction which led to the petitioner's indictment.

The respondent prosecutor also represents that while he is one of several attorneys who has done collection work for the bank, he has never represented the bank in [**518] connection with any transaction involving the petitioner, nor has he ever been requested to do so. Furthermore, he also states that since the time the indictments were returned, he has not performed any legal services for the bank in any capacity, nor has he [***4] performed title searches for any of the bank's customers. He also asserts that he has never been retained by the bank on a continuous basis, and to his knowledge, performed no more title and collection work than any other local attorney upon whom the bank relies for legal services. The respondent further denies any suggestion that any officer of the bank persuaded him to present the case for an indictment. He points out that he is a depositor in the only other bank in West Union and also has done title work for clients who have obtained loans from that bank.

Most courts which have considered the question of prosecutorial disqualification have articulated two general policy considerations that underlie the necessity of disqualification. One is based on the universally recognized principle that a prosecutor's duty is to obtain justice and not simply to convict. The United States Supreme Court in *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935), put the prosecutor's role in the following terms:

178 W. Va. 631, *, 363 S.E.2d 516, **;
1987 W. Va. L.J.XIS 633. ***

"[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as [***5] compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

We spoke to this point in Syllabus Point 3 of *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977):

"The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law."

State v. Hall, W. Va. , 304 S.E.2d 43 (1983); *State v. Kamney*, 169 W. Va. 764, 289 S.E.2d 485 (1982); *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981). See also, *State ex rel. Moran v. Ziegler*, 161 [***6] W. Va. 609, 244 S.E.2d 550, 552 (1978).

A second policy position is based on the fact that public confidence in the criminal justice system is maintained by assuring that it operates in a fair and impartial manner. Consequently, if a prosecutor has a conflict or personal interest in a criminal case that he is handling, this can erode the public confidence as to the impartiality of the system. E.g., *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972) (En Banc); *People v. Superior Court (Greer)*, 19 Cal.3d 255, 137 Cal. Rptr. 476, 561 P.2d 1164 (1977); *Burkett v. State*, 131 Ga. App. 662, 206 S.E.2d 848 (1974); *People v. Rhymer*, 32 Ill. App. 3d 431, 336 N.E.2d 203 (1975); *State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982); *People v. Doyle*, 159 Mich. App. 632, 406 N.W.2d 893 (1987); *State v. Croka*, 646 S.W.2d 389 (Mo. App. 1983); *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (1974); *State v. Cooper*, 63 Ohio Misc. 1, [*633] 409 N.E.2d 1070 (1980); *Ex parte Spain*, 589 S.W.2d 132 (Tex. Cr. App. 1979) (En Banc); Annot., 31 A.L.R.3d 953 (1970).

Prosecutorial disqualification can be divided into two major categories. The first is where [***7] the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. The most obvious situation is where the prosecutor in the past had represented the defendant on the same or a related charge and obtained confidential information that could be used in the pending [**519] criminal charge. See generally, Annot., 31 A.L.R.3d at 963.

A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question. See generally, Annot., 31 A.L.R.3d at 978.

As to the first category, the relator does not contend that the prosecutor obtained any privileged information arising from any representation of the defendant. The fact that the prosecutor has in the past represented the bank on collection matters would not disqualify him, nor would his doing title searches for persons who borrow from the bank since there is no claim that adverse privileged information was obtained which could be utilized [***8] against the defendant. The same reasoning applies to the dismissed creditor's suit.

Typical of the conflict category is *State ex rel. Moran v. Ziegler*, 161 W. Va. 609, 244 S.E.2d 550 (1978), where the attorney had been contacted by the defendant who was seeking to give himself up to the police. This attorney was subsequently appointed as a special prosecutor in the defendant's case. We held that his initial contact with the defendant created a conflict with his role as special prosecutor. In *State v. Britton*, 157 W. Va. 711, 203 S.E.2d 462 (1974), the prosecutor had met with the defendant after he had been indicted and had counsel, and had given him advice as to a possible plea arrangement. We concluded that this created a conflicting interest.

The basic thrust of the relator's claim for disqualification is that the prosecutor's deposit with and loan from the bank and his periodic representation of the bank has, in effect, created a "friendship" with the bank which, in turn, gives him a personal interest in the underlying criminal case.

We discussed the law relating to the disqualification of a prosecuting attorney on the basis of a personal interest in convicting the accused [***9] in *State v. Knight*, 168 W. Va. 615, 285 S.E.2d 401 (1981). We outlined the nature of the disqualification in Syllabus Point 4, and concluded that the prosecutor should be disqualified:

178 W. Va. 631, *; 363 S.E.2d 516, **;
1987 W. Va. LEXIS 633. ***

"Under circumstances where it can reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting attorney should be disqualified from prosecuting the case. Thus, where the defendant in a criminal prosecution has been convicted previously of a crime committed against the prosecuting attorney, has failed to make court-ordered restitution to the prosecutor, and has been accused of the crime by the prosecuting attorney's secretary, who was the sole witness to the alleged criminal act, the prosecuting attorney should disqualify himself." (Emphasis added.)

We noted in *Knight* that the Code of Professional Responsibility contains a conflict of interest provision in DR 5-101, which states in part that: "[A] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, [***10] business, property, or personal interests." Canon 9 of the Code of Professional Responsibility also states that "a lawyer should avoid even the appearance of professional impropriety." We also observed in *Knight* that "the ABA Standards for Criminal Justice 3-1-2, Conflicts of Interest (2d ed. 1980) states: '[a] prosecutor should avoid the appearance or reality of a conflict of interest with respect [*634] to official duties.'" 168 W. Va. at 625, 285 S.E.2d at 407.¹

1 Circuit courts unquestionably have the authority to disqualify a prosecuting attorney from acting in connection with the indictment or prosecution of a criminal case under the provisions of W. Va. Code, 7-7-8, which provides, as pertinent here, that "if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act." *State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 179 S.E.2d 735 (1971); *State v. Smith*, 117 W. Va. 598, 186 S.E. 621 (1936).

[***11] In reviewing the few cases that involve a prosecutor who has some business relationship [**520] with the victim, we find that the courts have generally sought to analyze the nature of the relationship to determine if it was of sufficient magnitude to give rise to a reasonable conclusion that he might go beyond, in the

words of *Knight*, his "ordinary dedication to his duty to see that justice is done." Syllabus Point 4, in part.

In *People v. Zimmer*, 51 N.Y.2d 390, 434 N.Y.S.2d 206, 414 N.E.2d 705 (1980), the court of appeals held that the prosecutor was disqualified because he was the corporation's general counsel and a shareholder. The corporation was characterized "while corporate in form, essentially was run as a one-man enterprise." 51 N.Y.2d at 392, 434 N.Y.S.2d at 207, 414 N.E.2d at 706. Its founder, the defendant Zimmer, resigned, leaving the corporation financially imperiled apparently as a result of his misdealing with its assets. Subsequently, the prosecutor obtained a number of criminal indictments against Mr. Zimmer arising out of his handling of the corporate affairs. The court reasoned that his position as the general counsel and shareholder in the corporation [***12] created a substantial personal interest which disqualified him from prosecuting the defendant.

The Missouri Supreme Court in *State v. Newman*, 605 S.W.2d 781 (Mo. 1980), refused to find the prosecutor disqualified where he was a personal friend of the deceased and a pallbearer at his funeral. His law firm had represented the deceased in his personal and business affairs. At the time of trial he was representing the deceased's widow in an estate matter.² Likewise, the Louisiana Supreme Court in *State v. Monk*, 315 So.2d 727 (La. 1975), refused to disqualify a prosecutor who was trying a defendant for armed robbery of a bank. The prosecutor at one time was counsel for a vice president and a member of its Board of Directors, but did not occupy these positions at time of trial.

2 In an earlier case, the Supreme Court of Missouri, without any factual elaboration, stated that assertions on appeal that the prosecutor was "counsel or depositor to the bank . . . [and had] personal friendship and political affiliation with its officials" would not result in reversible error where no objection was made below. *Garton v. State*, 454 S.W.2d 522, 526 (Mo. 1970). Obviously, there is a substantially greater burden where the disqualification is not asserted at the trial level. See *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), cert. denied, 469 U.S. 1106, 83 L. Ed. 2d 774, 105 S. Ct. 779 (1985). Some courts have concluded that the matter is waived if the disqualifying grounds are known and not raised at the trial level. E.g., *United States v. Heldt*, 215 U.S. App. D.C. 206, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied, 456 U.S. 926, 72 L. Ed. 2d 440, 102 S. Ct. 1971 (1982); *People v. Jiminez*, 187 Colo. 97, 528 P.2d 913 (1974) (En Banc).

178 W. Va. 631, *, 363 S.E.2d 516, **;
1987 W. Va. LEXIS 633, ***

[***13] In several earlier cases, disqualification was sought on the basis that the prosecutor was a depositor in the bank from which the defendant had illegally taken money. The disqualification issue was only briefly discussed and in two cases, the court found disqualification was not warranted, *Stapleton v. State*, 19 Ga. App. 36, 90 S.E. 1029 (1916); *State v. Bussa*, 176 La. 87, 145 So. 276 (1932); while in the third case recusal was ordered, *People v. Fitzsimmons*, 183 Mich. 284, 149 N.W. 976 (1914).

It is generally held that past representations of a victim on civil matters unrelated to the criminal charges involving the defendant, ordinarily will not disqualify a prosecutor. E.g., *Carter v. State*, 424 So.2d 1336 (Ala. Crim. App. 1982); *Shuttleworth v. State*, 469 N.E.2d 1210 (Ind. App. 1984); *State v. Hatfield*, 218 Neb. 470, 356 N.W.2d 872 (1984). This rule is distinguished from the situations where the prosecutor is currently representing the victim in a civil action which is connected to the occurrence that gave rise to the criminal proceedings. In this event, the prosecutor is ordinarily disqualified.

[*635] For example, in *Cantrell v. Commonwealth*, [***14] 229 Va. 387, 329 S.E.2d 22 (1985), a private prosecutor had assisted the state's attorney in the prosecution of a murder charge. He was retained by the family of the deceased victim who was their daughter. They also retained him in a civil action in which they were attempting to gain custody of their granddaughter from the defendant. There was also suggested the possibility of a wrongful death action by the family against the defendant. The Virginia Supreme Court concluded that a private prosecutor's ethical role is the same as [***521] a public prosecutor's and that he should have been disqualified.

To the same effect is *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), where the prosecutor represented the wife-victim in her divorce proceeding. The defendant husband had been charged with feloniously assaulting his wife. Even though the divorce action was not directly related to the assault charge, the court concluded that it was improper for the prosecutor to proceed on the criminal charge. It recognized that the prosecutor's control over the criminal charge gave him undue leverage in the pending divorce action.

In the present case we do not believe the facts as asserted are [***15] sufficient to warrant disqualification. The prosecution's past association with the bank was not on a retainer basis. His filing occasional suits to collect debts owed to the bank and title examinations for persons obtaining real estate loans do not constitute the kind of

close ties that would cast a shadow over his impartiality. He asserts that he does much the same work for the other bank, as do other local attorneys, and is a depositor in both banks. The prosecutor also states that since the indictment he has not done any work for the bank.

It appears that the court below initially held a hearing on the relator's motion. We are not advised of the exact content of the hearing or whether any evidence was presented. We spoke to the necessity of a hearing before a prosecutor could be disqualified from hearing a case in Note 2 of *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 163, 248 S.E.2d 602, 603 (1978):

"Notwithstanding the statement in *State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 882-883, 179 S.E.2d 735, 741-742 (1971), that the prosecutor can be summarily disqualified, it is questionable that he can be disqualified in a case without notice of the grounds for [***16] his disqualification and an opportunity to be heard, as a duly elected prosecutor may have an entitlement to office. *North v. West Virginia Board of Regents*, [160 W. Va. 248], 233 S.E.2d 411 (1977); *Waite v. Civil Service Commission*, [161 W. Va. 154], 241 S.E.2d 164 (1977); see, e.g., *State ex rel. Ilvedson v. District Court*, 70 N.D. 17, 291 N.W. 620 (1940); *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 175 N.E. 865 (1931); *Lattimore v. Vernor*, 142 Okl. 105, 288 P. 463 (1930); *Smith v. Gallagher*, 408 Pa. 551, 185 A.2d 135 (1962); *State v. Flavin*, 35 S.D. 530, 153 N.W. 296 (1915); Annot., 84 A.L.R.3d at 124."³

3 We do not suggest that the movant is entitled to have an evidentiary hearing in every case where a motion to disqualify a prosecutor is made. Where the grounds asserted are patently insufficient, the court is entitled to summarily dismiss the motion.

The relator in this case does not assert any claim that he was denied an opportunity to adequately develop [***17] his claim, and in view of this and the reasons heretofore stated, the writ of prohibition is denied.

Willis Lansing GANGER, Appellee, v. C. C. PEYTON, Superintendent of the Virginia State Penitentiary, Appellant (two cases)

Nos. 11102, 11103

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

379 F.2d 709; 1967 U.S. App. LEXIS 6186

April 3, 1967, Argued

May 30, 1967, Decided

DISPOSITION: [**1] No. 11,102, affirmed. No. 11,103, reversed.

COUNSEL: Reno S. Harp, III, Asst. Atty. Gen. of Virginia (Robert Y. Burton, Atty. Gen. of Virginia, on brief), for Appellant.

E. Waller Dudley, Alexandria, Virginia (Court-assigned Counsel), for Appellee.

JUDGES: Haynsworth, Chief Judge, and Boreman and Craven, Circuit Judges.

OPINION BY: CRAVEN

OPINION

[*710] CRAVEN, Circuit Judge:

This is an appeal by the Superintendent of the Virginia State Penitentiary from a judgment of the district court vacating and setting aside two sentences of imprisonment imposed upon Ganger by circuit courts of Virginia.

The King George County Conviction

Ganger was convicted on September 27, 1963, and sentenced to a term of five years in the penitentiary for the offense of indecent exposure. The district judge was of the opinion that he was so ineffectively represented by counsel as to make a farce of the trial, citing for comparison *Root v. Cunningham*, 344 F.2d 1 (4th Cir. 1965).

We do not reach the question because it is apparent that Ganger has not exhausted his state court remedies. It is unfortunate that state prisoners sometimes prefer the federal courts to the extent of ignoring [**2] the concurrent jurisdiction of state courts which have the primary duty of assuring the constitutionality of state trials. That the federal district court had the power to afford Ganger relief is not enough. It is still "unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation * * *." *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761 (1950), quoted with approval in *Fay v. Noia*, 372 U.S. 391, at 420, 83 S. Ct. 822, 839, 9 L. Ed. 2d 837 (1963). The doctrine of comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.*

In deciding to exercise jurisdiction, the district judge accorded too much weight to the effect of the direct appeal by Ganger to the Supreme Court of Appeals of Virginia. Seldom does the ineffectiveness of counsel appear on the face of the trial record without the necessity of developing the facts [**3] in respect to counsel's conduct in a supplemental proceeding. Denial of relief on the appeal does not mean that consideration of Ganger's contention is foreclosed in the state courts. Ganger should have filed a petition for writ of habeas corpus in the Circuit Court of King George County alleging ineffective representation. Such a remedy was available to him then and is presently available despite [*711] the long delay occasioned by his proceeding initially in federal court.

We respect and commend the nontechnical attitude of the district judge that moved him to consider the merits of the matter. Cf. *Webb v. Peyton*, 345 F.2d 521 (4th Cir. 1965). But this is more than a question of procedural nicety. It is becoming increasingly apparent that the federal district courts cannot possibly process all of the claims of state prisoners,¹ nor should they attempt to do so, without deferring initially to the state courts -- if such courts offer available and adequate remedies.

1 For the period from July 1, 1965, to July 1, 1966, 6,248 state prisoner petitions were filed in the federal district courts. This compares with 872 in the fiscal year 1960. W. Shafroth, Survey of the United States Courts of Appeals, Table S-5 (January 22, 1967).

[**4] *Stafford County Conviction*

Ganger received a six-month sentence in Stafford County for assaulting his wife. This sentence is to begin after he completes service of the five-year sentence imposed in King George County. But for the six-month sentence, Ganger would have been eligible for parole on the five-year sentence in November 1966. Unlike the King George County case, he could not have effectively sought relief in the state courts of Virginia from the six-month sentence imposed upon him in Stafford County. This is so because the Supreme Court of Appeals of Virginia continues to adhere to the rule that habeas corpus is not available to one until he begins actual service of the sentence attacked, *Peyton v. Williams*, 206

Va. 595, 145 S.E.2d 147 (1965), and Ganger had not begun to serve his Stafford County sentence at the time he filed his petition.

In *Martin v. Commonwealth of Virginia*, 349 F.2d 781 (4th Cir. 1965), we reexamined the concept, established in *McNally v. Hill*, 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934), that a sentence which a prisoner has not actually begun to serve does not satisfy the requirement in 28 U.S.C.A. Section 2241, [**5] defining the scope of federal habeas corpus, that the petitioner be "in custody," even though the result of the challenged sentence is to thwart his eligibility for parole. In the opinion by Judge Sobeloff, we concluded that *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963), and *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963), have equated "custody" with "restraint of liberty," and held that a denial of eligibility for parole is a sufficient restraint so as to put one "in custody" within the expanded meaning of 28 U.S.C.A. Section 2241. This court has since further liberalized the conditions under which a prisoner is deemed "in custody" within the meaning of 28 U.S.C.A. Section 2241. See *Williams v. Peyton*, 372 F.2d 216 (4th Cir. 1967); *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966).

Since Ganger was "in custody" within the meaning of 28 U.S.C.A. Section 2241 as to the six-month Stafford County sentence, the district court had jurisdiction to consider the petition. Moreover, because of the absence of an available [**6] state court remedy, there was no duty upon the district court to defer entertainment of the petition out of comity.

The Stafford County conviction is constitutionally invalid. The district court found that the state prosecuting attorney represented Ganger's wife in the prosecution of a divorce action which was pending at the time of the criminal trial and was based upon the same alleged assault on Mrs. Ganger. Ganger testified that the prosecuting attorney offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action. Ganger told his lawyer who represented him at the assault trial of the offer, and his lawyer discussed the matter with the prosecuting attorney. The district judge found as a fact that the prosecuting attorney neither admitted nor denied having made the offer, but the record below indicates that Ganger's attorney testified that the prosecuting [**7] attorney denied it. Perhaps influenced by the failure of the prosecuting attorney to testify in the habeas corpus proceeding, ² the district judge concluded that there had been such an offer. His finding is supported by substantial evidence and is not clearly erroneous. [**7]

2 The district judge found that he refused to come to court and the state did not subpoena him.

The Assistant Attorney General of Virginia concedes that the Commonwealth's Attorney should not have prosecuted the criminal case at the same time he was representing Ganger's wife in the divorce proceeding. ³ We agree. Such a conflict of interest clearly denied Ganger the possibility of fair minded exercise of the prosecutor's discretion. Not every criminal case goes to trial. Prosecuting attorneys frequently decline to charge, or nol pros, ⁴ criminal cases -- especially ones arising out of domestic relations. Aside from the possibility of a favorable charge decision, including nol pros, there is always the prospect of plea bargaining. ⁵

3 It is not clear whether the concession is made on the ground of an admitted constitutional violation or on the ground of a violation of the legal canons of ethics. The Legal Ethics Committee of the Virginia State Bar has unequivocally condemned representation by Commonwealth Attorneys of litigants in controversies relating to matters with which they must deal in the performance of their official duties. See Opinions of the Legal Ethics Committee, Virginia State Bar, Opinions No. 1 (Aug. 5, 1942), No. 32 (June 30, 1951), No. 117, March 29, 1963), No. 121 (Jan. 11, 1963), No. 131 (Oct. 2, 1963). In Opinion Number 121 the Committee states that "an attorney's acceptance of the office of Commonwealth's Attorney disqualifies him from private practice insofar as such private practice relates to matters with which he must deal in the performance of his official duties, and he should not accept representation in any civil matter, the subject of which is within the scope of his official duties, until final disposition has been made of all reasonable possibilities of any present or future duty on his part."

[**8]

4 The extensive powers of the prosecuting attorney are reviewed in Note, Prosecutor's Discretion, 103 Pa.L.Rev. 1057 (1955). The author concludes that "the discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official." Id.

The Report of the President's Commission on Law Enforcement and Administration of Justice recognizes in a section entitled "Diversion of Cases Before Charge" that approximately one-half of those arrested are dismissed by the police, a prosecutor, or a magistrate at an early stage of the case. *Nolle prosequi* relates to dismissal after charge, but a prosecutor in his discretion may decline to file a charge. The Com-

mission "regards the exercise of discretion by prosecutors as necessary and desirable" and recommends that prosecutors "make discriminating charge decisions" on the basis of explicit policies. The Commission's report includes the following quote: "When the charge is reduced, as it is in as many as two-thirds of all cases in some cities, the prosecutor is usually the official who reduces it." The President's Comm'n of Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Soc'y* at 11 (1967). In an article in the *Saturday Evening Post*, adapted from a book to be entitled *Lawyers and Laws*, by Martin Mayer, it is said that of those arrested on a serious criminal charge, more people are cleared and released by the police themselves than by the entire legal process of arraignment, preliminary hearing, indictment by the grand jury, and trial. The author then suggests that "a defendant's next best chance is to persuade the D.A. not to prosecute: six or seven times as many people are released between arraignment and trial as are acquitted after a trial." He then quotes an experienced criminal lawyer and defense attorney as saying "the district attorneys don't go around indicting people indiscriminately." M. Mayer, *The Criminal and the Law*, *The Saturday Evening Post*, Feb. 4, 1967, at 25.

[**9]

5 It is increasingly recognized that plea bargaining is an essential, inevitable, and not improper part of the criminal process. See ABA Project on Minimum Standards for Criminal Justice, *Pleas of Guilty*, pt. 3 (Tent. Draft Feb. 1967).

The President's Commission on Law Enforcement and Administration of Justice has reported:

"The negotiated guilty plea serves important functions. As a practical matter, many courts could not sustain the burden of having to try all cases coming before them. The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials. Tremendous investments of time, talent, and money, all of which are in short supply and can be better used elsewhere, would be necessary if all cases were tried. It would be a serious mistake, however, to assume that the guilty

plea is no more than a means of disposing of criminal cases at minimal cost. It relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system. The guilty plea is used to mitigate the harshness of mandatory sentencing provisions and to fix a punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible under inadequate penal codes. It is frequently called upon to serve important law enforcement needs by agreements through which leniency is exchanged for information, assistance, and testimony about other serious offenders.

* * *

"Plea negotiations can be conducted fairly and openly, can be consistent with sound law enforcement policy, and can bring a worthwhile flexibility to the disposition of offenders." The President's Comm'n on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Soc'y* at 135 (1967).

{**10}

[*713] Because of the prosecuting attorney's own self-interest in the civil litigation ⁶ (including the possibility that the size of his fee would be determined by what could be exacted from defendant), he was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree of assault, ⁷ or (3) whether to recommend a suspended sentence or other clemency.

⁶ Such a conflict of interest as found by the district court might well amount to abuse of process. See Prosser, *Torts* § 115, at 876 (3d ed. 1964).

⁷ Ganger was actually tried for felonious assault, the maximum punishment for which was twenty years.

Representing Ganger's wife in the divorce proceeding suggests the strong possibility that the prosecuting attorney may have abdicated to the prosecuting witness (Ganger's wife) in the criminal case the exercise of his responsibility and discretion in making charge decisions. If she did not actually make the [**11] decision to prosecute for felonious assault, certainly her interests were influential, and those conflicting interests may have impeded appropriate plea bargaining. *

8 See note 5 supra.

At common law, a prosecuting attorney "is the representative of the public in whom is lodged a discretion * * *, which is not to be controlled by the courts or by an interested individual * * *." *United States v. Brokaw*, 60 F. Supp. 100, 101 (S.D. Ill. 1945), quoted with approval in *United States v. Cox*, 342 F.2d 167, 192 (5th Cir. 1965) (Judge Wisdom concurring) (emphasis added).

The Supreme Court of Appeals of Virginia, in *Macon v. Commonwealth*, 187 Va. 363, 373, 46 S.E.2d 396, 401 (1948), said:

"While the laws of the State vest in this officer [prosecuting attorney] wide authority in instituting prosecutions, such authority carries with it a commensurate responsibility. It should be exercised with caution and only in cases where, after a proper investigation, he is reasonably [**12] satisfied of the guilt of the person suspected of crime. It is just as much his duty to protect his fellow citizens from unjustified prosecutions as it is to prosecute those who are guilty."

In *Macon*, the Supreme Court of Appeals of Virginia reversed the murder conviction of the defendant on another ground, but intimated that the unfairness of the prosecuting attorney to the defendant may have disqualified him from acting as prosecutor in the case.

[*714] In *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), the state prosecutor's knowing use of perjured testimony was held to be a denial of due process of law in violation of the *Fourteenth Amendment*. The Attorney General of California contended that "the acts or omissions of a prosecuting attorney can ever, in and by themselves, amount either to due process of law or to a denial of due process of law." 294 U.S. at 111-112, 55 S. Ct. at 341. In a per curiam opinion, the Supreme Court said:

"Without attempting at this time to deal with the question at length, we deem

it sufficient for the present purpose to say that we are unable to approve this narrow view [**13] of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." 294 U.S. at 112, 55 S. Ct. at 341-2.

The Court went on to say that "the action of prosecuting officers on behalf of the state, * * * may constitute state action within the purview of the *Fourteenth Amendment*." 294 U.S. at 113, 55 S. Ct. at 342.

In *Turney v. State of Ohio*, a case involving the compensation of a mayor from costs and fines he imposed on those convicted of criminal offenses, the Supreme Court said:

"That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. * * * It certainly violates the *Fourteenth Amendment* and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." 273 U.S. 510, 522, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927). [**14]

The prosecuting attorney is an officer of the court, holding a quasi judicial position. "His primary responsibility is essentially judicial -- the prosecution of the guilty and the protection of the innocent, *Griffin v. United States*, 295 F. 437, 439-440 (C.A. 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest." *Bauers v. Heisel*, 361 F.2d 581, 590 (3d Cir. 1966).

Although conceding that the prosecuting attorney should not have represented Ganger's wife in private litigation at a time when he was charged with the duty to fairly prosecute or otherwise fairly dispose of the criminal charge against Ganger, the State contends that the improper conduct resulted in no harm to Ganger. We

cannot so assume.⁹ It is true that although charged with a serious assault that could have resulted in imprisonment to the extent of twenty years, Ganger was convicted of a lesser assault and sentenced to only six months. But we do not know and cannot now ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owed to all persons [**15] charged with crime in his court. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 711 (1967).

⁹ See *Whitaker v. Warden*, 362 F.2d 838, (4th Cir. 1966).

We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the

Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the *Due Process Clause of the Fourteenth Amendment*. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935); see also *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 [**715] (1967) (prosecutor's arbitrary use of nol pros with leave held unconstitutional).

The judgment of the district court granting the writ of habeas corpus and vacating the sentence in the King George County case is reversed. [**16] The judgment of the district court granting the writ and vacating the sentence in the Stafford County case is affirmed.

No. 11,102, affirmed.

No. 11,103, reversed.

24 Va. App. 561, *, 484 S.E.2d 145, **;
1997 Va. App. LEXIS 240. ***

HERBERT W. LUX, JR. v. COMMONWEALTH OF VIRGINIA

Record No. 1304-96-2

COURT OF APPEALS OF VIRGINIA

24 Va. App. 561; 484 S.E.2d 145; 1997 Va. App. LEXIS 240

April 22, 1997, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY. II. Selwyn Smith, Judge Designate.

DISPOSITION: *Reversed and remanded.*

COUNSEL: Muriel-Theresa Pitney, Senior Assistant Public Defender, for appellant.

John K. Byrum, Jr., Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

JUDGES: Present: Judges Coleman, Elder and Fitzpatrick. **OPINION BY JUDGE LARRY G. ELDER.**

OPINION BY: LARRY G. ELDER

OPINION

[*565] [**147] **OPINION BY JUDGE LARRY G. ELDER**

Herbert W. Lux, Jr. (appellant) appeals an order of the trial court revoking his suspended jail sentence from a previous conviction. He contends that the trial court erred when it denied his motion to disqualify the Commonwealth's attorney. For the reasons that follow, we reverse and remand.

[*566] I.

FACTS

In January, 1994, a jury convicted appellant of "grand larceny by false pretenses" and "grand larceny -- mechanic's lien fraud" and acquitted him of "construction lien fraud." Appellant represented himself *pro se* at his trial but received assistance from a public defender assigned to his case. After he was convicted but before he was sentenced, appellant dismissed the public defender as his counsel. In March, 1994, the trial court sentenced [***2] appellant to nine months in jail but suspended this sentence on the condition that appellant pay restitution to the victims of his larcenies. Appellant appealed his convictions to both this Court and the Virginia Supreme Court, and his petitions were denied. Appellant then filed notice of his intent to appeal to the United States Supreme Court.

On July 1, 1995, the public defender who assisted appellant at his trial was hired to work in the Commonwealth's Attorney's office. The office purportedly established a "chinese wall" procedure that prohibited the public defender from participating in any of the proceedings against appellant. The Commonwealth's attorney made this assertion during his argument at the hearing on appellant's motion to disqualify but offered no

evidence proving the existence or nature of the screening procedures utilized.

[**148] On January 4, 1996, before the time had expired for the filing of appellant's appeal to the United States Supreme Court, the Commonwealth moved the trial court to revoke appellant's suspended jail sentence. At a show cause hearing, the trial court found that appellant had violated the conditions of his suspended sentence by not paying restitution [***3] to his victims. The trial court continued the matter for sentencing at a date after the conclusion of appellant's appeal to the United States Supreme Court.

On January 11, 1996, appellant, acting *pro se*, filed a civil action in federal court against the Commonwealth's attorney [*567] and one of the victims of his larcenies. In his civil complaint, appellant alleged that the Commonwealth's attorney and the victim had violated 42 U.S.C. § 1983 by conspiring to maliciously prosecute him for construction lien fraud, the charge of which he was acquitted at his trial in 1994.

On January 25, 1996, the time period expired for appellant to file his petition for a writ of certiorari to the United States Supreme Court pertaining to his 1994 convictions. Appellant had failed to perfect his appeal.

On April 15, 1996, while appellant's federal civil action was pending, appellant moved the trial court to disqualify the Commonwealth's attorney and appoint a special prosecutor. Appellant argued that the Commonwealth's attorney's status as a party in civil litigation involving appellant and the employment by the Commonwealth's Attorney's office of appellant's former trial counsel created an unconstitutional [***4] conflict of interest. The trial court denied appellant's motion and continued the revocation proceeding until June 5. On June 5, the trial court concluded that appellant was still in contempt of its restitution order and ordered him to serve the remaining seven months of his jail sentence.

II.

DISQUALIFICATION OF COMMONWEALTH'S ATTORNEY

Appellant contends that the trial court committed reversible error when it denied his motion to disqualify the Commonwealth's attorney. Appellant argues that the Commonwealth's attorney was disqualified by virtue of his personal interest in appellant's federal civil action and

24 Va. App. 561, *, 484 S.E.2d 145, **;
1997 Va. App. LEXIS 240. ***

by the conflicting interest imputed to him by the employment in the Commonwealth's Attorney's office of appellant's former counsel. We hold that appellant's § 1983 action against the Commonwealth's attorney did not create an unconstitutional conflict of interest but that the trial court abused its discretion when, under the circumstances presented, it failed to disqualify the Commonwealth's [§568] attorney based upon the Commonwealth's Attorney's employment of appellant's former counsel.

A.

Prosecuting attorneys have broad discretionary power over criminal defendants at several [***5] stages of the criminal process. See *Wayte v. United States*, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530, 84 L. Ed. 2d 547 (1985). Within limits, prosecutors decide whether or not to prosecute an individual, determine the exact charges for which an individual will be tried, and, if the individual is convicted, recommend the magnitude and nature of the individual's sentence. *Id.* (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978)). "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for individual and institutional abuse." *Bordenkircher*, 434 U.S. at 365, 98 S. Ct. at 669.

In order to protect prosecutorial impartiality, a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties. See *People v. Hamilton*, 46 Cal. 3d 123, 141, 249 Cal. Rptr. 320, 328, 756 P.2d 1348, 1357 (Cal. 1988) cert. denied, 489 [***6] U.S. 1040, 109 S. Ct. 1176, 103 L. Ed. 2d 238 (1989); 63A Am. Jur. 2d *Prosecuting Attorneys* § 30-32 (1984); 27 C.J.S. *District and Prosecuting Attorneys*

§ 12(6) (1959); see [**149] generally T.J. Griffin, *Disqualification of Prosecuting Attorney on Account of Relationship with Accused*, 31 A.L.R.3d 953 (1970). A Commonwealth's attorney's duties include the impartial prosecution of those accused of crime and the duty to see that an accused is accorded a fair trial. See *Commonwealth v. Kilgore*, 15 Va. App. 684, 693, 426 S.E.2d 837, 842 (1993); *Cantrell v. Commonwealth*, 229 Va. 387, 393, 329 S.E.2d 22, 26 (1985).

Criminal defendants are afforded constitutional protection against prosecutors who are partial to interests beyond [§569] their official duties. The due process rights of a criminal defendant under both the Virginia and United States Constitutions are violated when the

defendant is prosecuted by a Commonwealth's attorney who has a conflict of interest relevant to the defendant's case. ¹ See *Cantrell*, 229 Va. at 394, 329 S.E.2d at 26-27 (holding that "[a] conflict of interest on the part of the prosecution" violates the Due Process Clause of the Virginia Constitution); [***7] *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that an attempt by a prosecuting attorney to serve two masters violates the Due Process Clause of the Fourteenth Amendment). The specific due process right implicated when a Commonwealth's attorney has a conflict of interest is the defendant's right to the "fair minded exercise of the prosecutor's discretion." *Ganger*, 379 F.2d at 712.

1 Due process protections apply to post-conviction proceedings to revoke a defendant's suspended sentence. See *Copeland v. Commonwealth*, 14 Va. App. 754, 756, 419 S.E.2d 294, 295 (1992).

The decision whether to disqualify a Commonwealth's attorney in a particular case is committed to the sound discretion of the trial court. *Hamilton*, 46 Cal. 3d at 140, 249 Cal. Rptr. at 328, 756 P.2d at 1356. The issue generally arises in at least two situations:

the first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may [***8] be adverse to the defendant's interest in regard to the pending criminal charges. . . . A second [situation] is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

Nicholas v. Sammons, 178 W. Va. 631, 633, 363 S.E.2d 516, 518 (1987). A trial court should grant a criminal defendant's motion to disqualify under circumstances where it can be reasonably inferred that the Commonwealth's attorney has either a personal interest in the outcome of the prosecution or an interest arising from his or her former representation of [§570] the defendant that conflicts with the fair minded exercise of his or her prosecutorial discretion. See *Kilgore*, 15 Va. App. at 694-95, 426 S.E.2d at 843; *State v. Knight*, 168 W. Va. 615, 625, 285 S.E.2d 401, 407 (1981); *Ganger*, 379 F.2d at 712-13, 714. ²

2 Virginia courts have identified three scenarios in which a Commonwealth's attorney has an unconstitutional conflict of interest precluding his

24 Va. App. 561, *, 484 S.E.2d 145, **;
1997 Va. App. LEXIS 240. ***

prosecution of a criminal defendant. In *Contrell*, the Virginia Supreme Court held that a special Commonwealth's attorney unconstitutionally attempts to serve two masters when he or she prosecutes a criminal defendant after undertaking representation of the crime victim in a civil action against the defendant. 229 Va. at 394, 329 S.E.2d at 26. In *Kilgore*, we held that a Commonwealth's attorney violates a defendant's due process rights if he or she participates in the defendant's prosecution after either (1) representing the defendant in the same matter or (2) working as a member of a firm in which a partner represented the accused in the same matter. 15 Va. App. at 694-95, 426 S.E.2d at 842-43.

[***9] We hold that the trial court did not abuse its discretion when it determined that appellant's § 1983 action against the Commonwealth's attorney failed to warrant the Commonwealth's attorney's disqualification. At the time appellant filed the civil action on January 11, the revocation proceeding had already been initiated and partially litigated. Thus, the danger posed by appellant's lawsuit was the possible conflict between the Commonwealth's attorney's interest in avoiding financial loss and damage to his professional reputation and the impartial exercise of his discretion in recommending a sentence.

We cannot say that the trial court abused its discretion because appellant's [**150] § 1983 action did not create an actual conflict of interest for the Commonwealth's attorney. The Commonwealth's attorney was absolutely immune from any liability for the actions complained of by appellant in his civil suit. In suits against executive officials under § 1983, these officials are afforded either qualified immunity or absolute immunity. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-269, 113 S. Ct. 2606, 2613, 125 L. Ed. 2d 209 (1993). Under qualified immunity,

[*571] government [***10] officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Id. (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). With absolute immunity, government officials have "absolute protection from damages liability." *Id.* While state prosecutors have qualified immunity from liability under § 1983 for actions performed in their administrative and investigative functions, *id.* at 271-275, 113

S. Ct. at 2615-16,³ they enjoy absolute immunity from monetary judgments for actions "intimately associated with the judicial phase of the criminal process," including "initiating a prosecution and . . . presenting the state's case." *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128 (1976). This absolute immunity includes a prosecutor's involvement in an alleged conspiracy to initiate a malicious prosecution. See *Elder v. Athens-Clarke Cty., Ga. through O'Looney*, 54 F.3d 694, 695 (11th Cir. 1995); *Rose v. Bartle*, [***11] 871 F.2d 331, 347 (3rd Cir. 1989). Because the dismissal of the

3 Administrative and investigative functions for which prosecuting attorneys are entitled to qualified immunity include giving legal advice to the police, making statements to the media, and engaging in the preliminary investigation of an unsolved crime. See *Burns v. Reed*, 500 U.S. 478, 496, 111 S. Ct. 1934, 1944-45, 114 L. Ed. 2d 547 (1991) (legal advice to police); *Buckley*, 509 U.S. at 273-77, 113 S. Ct. at 2616, 2617 (investigating unsolved crimes and making statements to media).

§ 1983 action on immunity grounds was assured, the Commonwealth's attorney had no personal interest in the lawsuit that might interfere with his decision to recommend either a partial or total revocation of appellant's suspended jail sentence.

B.

Appellant contends that the employment of his former counsel by the Commonwealth's Attorney's office also disqualified the Commonwealth's attorney from prosecuting the motion [*572] to revoke appellant's [***12] suspended sentence. Appellant argues that the former public defender was disqualified because he represented appellant in the same matter and that this conflict of interest should be imputed to other members of the Commonwealth's Attorney's office. We agree because the Commonwealth failed to prove that it utilized effective screening procedures to prevent improper contact between appellant's former counsel and the Commonwealth's attorney handling the revocation proceeding.

Appellant presents an issue of first impression in Virginia: whether an entire Commonwealth's Attorney's office is disqualified from prosecuting a case against a defendant when an attorney who previously counseled the defendant in a related matter joins the office. It is well established that "a due process violation occurs when, subsequent to the establishment of an attorney-client relationship, the attorney participates in the

24 Va. App. 561, *, 484 S.E.2d 145, **;
1997 Va. App. LEXIS 240. ***

prosecution of his former client." *Kilgore*, 15 Va. App. at 694, 426 S.E.2d at 843; see also *Thompson v. State*, 246 So. 2d 760, 763 (Fla. 1971). A different question is presented, however, when the defendant's lawyer-turned-prosecutor has knowledge of relevant client confidences but [***13] is screened from participating in the defendant's prosecution.

Courts in other jurisdictions are divided as to whether the presence of a criminal defendant's former counsel in a prosecutor's office automatically precludes the entire office from proceeding against the defendant in a related matter. The majority of jurisdictions do not *per se* disqualify the entire prosecutor's office solely because one member of the staff had represented the defendant in a related matter. Instead, these jurisdictions permit another prosecutor to handle the case if the [**151] defendant's former counsel has been effectively screened from participating in the prosecution. See *State v. Pennington*, 115 N.M. 372, 851 P.2d 494, 498 (N.M. 1993), cert. denied, 115 N.M. 409, 852 P.2d 682 (citing cases in 20 states and 2 federal circuits that follow the majority rule). These courts hold that a prosecutor's public duty to seek justice rather than profits in combination with an effective "chinese wall" provides an adequate safeguard against the improper disclosure of a [*573] defendant's confidences. See 851 P.2d at 498-500; *In re Grand Jury 91-1*, 790 F. Supp. 109, 112 (E.D.Va. 1992) (citing *United States v. Caggiano*, 660 F.2d 184, 191 [***14] (6th Cir. 1981)). These courts also hold that a *per se* rule results in the unnecessary disqualification of prosecutors in cases where the risk of a breach of confidentiality is slight and inhibits the ability of prosecuting attorney's offices to hire the best possible employees. *Pennington*, 851 P.2d at 499; *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868, 874 (N.C. 1991).

Jurisdictions that follow the minority rule prohibit screening to remedy imputed conflicts and *per se* disqualify the entire prosecutor's office, regardless of the good faith intent and motivation of the prosecutors involved. See *State v. Latigue*, 108 Ariz. 521, 522-23, 502 P.2d 1340, 1341-42 (1972); *Younger v. Superior Court*, 77 Cal. App. 3d 892, 896, 144 Cal. Rptr. 34, 37 (Cal. Ct. App. 1978); *People v. Stevens*, 642 P.2d 39, 41 (Colo. Ct. App. 1981); *State v. Cooper*, 63 Ohio Misc. 1, 6-7, 409 N.E.2d 1070, 1073 (1980); *People v. Shinkle*, 51 N.Y.2d 417, 420-21, 434 N.Y.S.2d 918, 920, 415 N.E.2d 909, 910-11 (1980). Courts in these jurisdictions hold that a *per se* rule is required to preserve public confidence in the criminal justice system by eliminating any appearance of impropriety. See [***15] *Stevens*, 642 P.2d at 41 (citing *Shinkle*, 51 N.Y.2d at 420-21, 434 N.Y.S.2d at 920, 415 N.E.2d at 910).

We hold that the employment of a criminal defendant's former counsel in a Commonwealth's Attorney's

office does not *per se* disqualify the entire office from handling the prosecution of the defendant's case in a related matter. Instead, whether the apparent conflict of interest created when a criminal defendant's former counsel joins a Commonwealth's Attorney's office justifies the disqualification of other members of the office is a matter committed to the exercise of discretion by the trial court. *Pennington*, 851 P.2d at 500. We believe that a more flexible, case-by-case approach enables a trial court to protect a criminal defendant from the due process concern at issue -- the disclosure of confidences revealed to his attorney during the

attorney-client relationship--while [*574] avoiding unnecessary disqualifications and other disruptive effects that a *per se* rule would have on Commonwealth's Attorney's offices.

We are mindful of the opinion of the Virginia State Bar's Standing Committee on Legal Ethics and Unauthorized Practice of Law that holds that "chinese [***16] walls" or other screening procedures do not cure imputed conflicts within a Commonwealth's Attorney's office. See Virginia State Bar Standing Committee on Legal Ethics and Unauthorized Practice of Law, Opinion No. 1020 (Jan. 21, 1988) (holding that the plan for erecting a "chinese wall" within a Commonwealth's Attorney's office does not eliminate any potential imputed conflicts arising under Rules of the Supreme Court of Virginia Pt. 6, § II, DR 5-105). While we agree that an ethical rule that strives to avoid the appearance of impropriety is a worthy standard for professional conduct, a criminal defendant's constitutional right to due process does not entitle him to a prosecution free of such appearances. Cf. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333 (1980) (stating that a defendant's Sixth Amendment right to counsel is not violated when his lawyer has a "possible" or "potential" conflict of interest). Instead, a criminal defendant is denied due process only when his former counsel joins a Commonwealth's Attorney's office and is not effectively screened from contact with the Commonwealth's attorneys who are handling the defendant's case [***17] on a related matter. See [**152] *Thompson*, 246 [**575] So. 2d at 763 (holding that a defendant's due process rights are violated only if his former lawyer prosecutes him on a matter related to the representation or discloses client confidences to other prosecutors); *United States v. Goot*, 894 F.2d 231, 236-37 (7th Cir. 1990), cert. denied, 498 U.S. 811, 111 S. Ct. 45, 112 L. Ed. 2d 22 (1990) (holding that defendant's right to due process was not violated by the employment of his former counsel in the U.S. Attorney's office where the former counsel recused himself and was screened from the prosecution of defendant's case).

24 Va. App. 561, *, 484 S.E.2d 145, **;
1997 Va. App. LEXIS 240, ***

4 Screening procedures such as "chinese walls" are utilized in other contexts in the criminal process. For example, in *Welsh v. Commonwealth*, the defendant in a state criminal proceeding was granted immunity from federal prosecution and compelled to testify before a federal grand jury and at a federal criminal trial. 246 Va. 337, 341-42, 437 S.E.2d 914, 915-16 (1993). In order to prevent the state prosecution from being unconstitutionally tainted by information obtained from the defendant under his federal grant of immunity, the Commonwealth's attorneys in *Welsh* established a "chinese wall" between themselves and the information known to federal prosecutors regarding the defendant's immunized testimony. *Id.* at 346-47, 437 S.E.2d at 918-19. This chinese wall was an integral component of the Commonwealth's case to show that its prosecution of the defendant was based on information wholly independent from his immunized testimony. *Id.*

[***18] Although the decision to disqualify an entire Commonwealth's Attorney's office is committed to the exercise of the trial court's discretion, we also hold that, in light of due process considerations, a trial court should grant a criminal defendant's motion to disqualify when the circumstances indicate that the defendant's former counsel in a related matter has not been effectively screened from contact with the Commonwealth's attorneys who are prosecuting the defendant. *See Pennington*, 851 P.2d at 500-01; *Camacho*, 406 S.E.2d at 875 (citing *Young v. State*, 297 Md. 286, 297, 465 A.2d 1149, 1155 (1983)). In a hearing on a defendant's motion to disqualify, the defendant has the burden of proving that a member of the Commonwealth's Attorney's office counseled him on a matter related to the pending criminal case. *See Pennington*, 851 P.2d at 500-01. If the defendant satisfies this burden, a presumption arises that the employees of a Commonwealth's Attorney's office share confidences with respect to matters handled by the office. *See 851 P.2d at 501* (citing *Goot*, 894 F.2d at 234-35). The Commonwealth then must rebut this presumption by proving that the defendant's former [***19]

lawyer has been effectively screened from contact with the Commonwealth's attorneys working on the defendant's case. *See id.*

Based on the circumstances of this case, we hold that the trial court abused its discretion when it denied appellant's motion to disqualify. The record established that appellant's counsel at trial had joined the Commonwealth's Attorney's office prior to the initiation of the proceeding to revoke [*576] appellant's suspended sentence. The revocation proceeding is related to appellant's initial trial because they arose from the same matter and the confidences that appellant disclosed to his counsel in preparation for the trial could be highly relevant to the attempt to revoke his sentence. Additionally, the Commonwealth failed to meet its burden of proving that appellant's former counsel had been effectively screened from contact with the Commonwealth's attorney handling the revocation proceeding. Although the Commonwealth's attorney asserted during argument that he had erected a "chinese wall" between himself and appellant's former counsel, the Commonwealth's attorney offered no evidence, such as affidavits by him and appellant's former counsel, regarding the existence [***20] and effectiveness of the screening procedures actually utilized. *See State ex. rel. Tyler v. MacQueen*, 191 W. Va. 597, 600, 447 S.E.2d 289, 292 (1994) (indicating that affidavit by prosecuting attorney and member of office who previously represented defendant was sufficient evidence to prove existence of effective screening procedures). Because the Commonwealth did not meet its burden of proving that it had implemented effective screening procedures to prevent the disclosure of appellant's confidences, we hold that the trial court abused its discretion when it denied appellant's motion to disqualify the Commonwealth's attorney.

For the foregoing reasons, we reverse the order of the trial court revoking appellant's suspended sentence. We remand this case to the trial court for further proceedings [**153] consistent with this opinion if the Commonwealth be so advised.

Reversed and remanded.

39 Va. App. 342, *, 573 S.E.2d 272, **;
2002 Va. App. LEXIS 741. ***

MERRY CHRISTINE PEASE v. COMMONWEALTH OF VIRGINIA

Record No. 2761-00-3

COURT OF APPEALS OF VIRGINIA

39 Va. App. 342; 573 S.E.2d 272; 2002 Va. App. LEXIS 741

December 10, 2002, Decided

SUBSEQUENT HISTORY: *Affirmed by Pease v. Commonwealth, 2003 Va. LEXIS 95 (Va., Oct. 31, 2003)*

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF WISE COUNTY. J. Robert Stump, Judge.

Pease v. Commonwealth, 2002 Va. App. LEXIS 203 (Va. Ct. App., Apr. 2, 2002)

DISPOSITION: Affirmed.

COUNSEL: Gerald L. Gray (Robert M. Galumbeck; Gerald Gray Law Firm; Dudley, Galumbeck, Necessary and Dennis, on brief), for appellant.

John H. McLees, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judges Benton, Elder, Annunziata, Bumgardner, Frank, Humphreys, Clements, Agee, Felton and Kelsey. **OPINION BY JUDGE RUDOLPH BUMGARDNER, III.**

OPINION BY: RUDOLPH BUMGARDNER, III

OPINION

[*346] [**274] **OPINION BY JUDGE RUDOLPH BUMGARDNER, III**

UPON A REHEARING EN BANC

A jury convicted Merry Christine Pease of second degree murder and use of a firearm during the murder of her husband, Dennis Pease. The defendant contends the trial placed her in double jeopardy, the substitute prosecutor had a personal interest in the outcome of the case, and the evidence [*347] was insufficient to convict. A panel of this Court held the defendant was not placed twice in jeopardy nor was the substitute prosecutor disqualified, but it held the evidence was insufficient and reversed the convictions. We granted a petition for rehearing *en banc* and stayed the mandate of the panel [***2] decision. Upon rehearing *en banc*, we affirm the trial court.

In August 1994, a jury convicted the defendant of the murder of her husband. This Court reversed the conviction because the Commonwealth's Attorney examined a witness during her appearance before the grand jury and influenced the grand jury in returning the indictment. *Pease v. Commonwealth, 24 Va. App. 397, 400, 482 S.E.2d 851, 852 (1997).*

On remand, the trial judge appointed substitute Commonwealth's attorneys, *Code* § 19.2-155, and a new grand jury re-indicted. Those prosecutors moved to *nolle prosequi* the indictments because they received a report

of the medical examiner that ruled the death a suicide. The substitute Commonwealth's attorneys did not have the report when they re-indicted, and it was not in the files received from the first prosecutor. The trial judge granted the motion.

Several months later, the trial judge appointed Timothy McAfee, the Commonwealth's Attorney at the first trial, substitute Commonwealth's attorney. A grand jury indicted the defendant for the third time. The defendant moved to dismiss the indictments because of prosecutorial [***3] misconduct at the first trial and because the substitute Commonwealth's attorney had conflicts of interest. The trial judge denied the motions.

"It has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson, 488 U.S. 33, 38, 102 L. Ed. 2d 265, 109 S. Ct. 285 (1988).* The defendant argues that double jeopardy bars her retrial [*348] because the prosecutor's misconduct caused reversal of the first conviction. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon v. Kennedy, 456 U.S. 667, 676, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982).* *Kennedy* rejected an attempt "to broaden the test from one of *intent* to provoke a motion for a mistrial to a more generalized standard [***4] of 'bad faith conduct' or 'harassment' on the part of the . . . prosecutor." *Id.* at 674.

In this case, the Commonwealth's Attorney violated statutory criminal procedure by questioning a witness during her grand jury appearance. As the trial judge found, the misconduct was not an instance in which the "prosecutor was trying this case and got to a certain point and thought he was going to lose it." The record reflects nothing to indicate the prosecutor intended to delay the trial or to goad the defendant into asking for [**275] a mistrial. "Without the requisite intent, however, gross prosecutorial misconduct will not satisfy the exception set forth in *Kennedy*." *Robinson v. Commonwealth, 17 Va. App. 551, 555, 439 S.E.2d 622, 625, 10 Va. Law Rep. 798 (1994).* Accordingly, we hold the trial court correctly denied the motion to bar retrial.

The defendant argues that the substitute Commonwealth's attorney, Timothy McAfee, had a personal interest in the outcome of the second trial. She asserts that when the trial judge appointed him as substitute Commonwealth's attorney, McAfee had two ethical complaints against him pending from the first trial. She contends that he could not be [***5] impartial and the trial judge erred in not dismissing the indictment.

The Virginia State Bar was investigating two complaints arising from McAfee's conduct during the first trial: improper communication with the first grand jury, and withholding a medical examiner's report indicating the victim committed suicide. After a full hearing on the motion to dismiss for [*349] prosecutorial misconduct, the trial court noted that McAfee had been a federal prosecutor and "mixed the federal with the state grand jury situations." It found that it was just as probable as not that the medical examiner's report was a part of the documents received by McAfee from the medical examiner. It did not find McAfee withheld the report from the materials furnished the defense.

The trial court concluded that McAfee was not retaliating, had no reason to be vindictive, and demonstrated the ability to be fair, impartial, and objective. The trial judge determined that McAfee had no "personal interest in the outcome of [the] case" and no actual bias to bar his participation as the prosecutor.

"A special prosecutor appointed by the trial judge steps into the role of public prosecutor and necessarily accepts that duty [***6] of impartiality." *Adkins v. Commonwealth*, 26 Va. App. 14, 19, 492 S.E.2d 833, 835 (1997). The record supports the trial court's ruling that the special Commonwealth's attorney was impartial. Accordingly, we affirm the ruling.

Dennis Pease, the defendant's husband, was killed by two gunshots fired within an inch of his chest. The Commonwealth maintains his death was murder; the defendant asserts it was suicide. It was one or the other. The Commonwealth postulated that the defendant shot her husband in the bedroom during an argument, that he walked into the living room and collapsed on the floor where the defendant shot him a second time, and that she then shot herself while in the kitchen to disguise the murder.

The defendant postulated that the victim shot the defendant, firing at her from the bedroom door down the hall toward the kitchen. The defendant escaped and ran from the trailer. When he saw that she had run to a neighbor's house, the victim shot himself with the bullet passing through his lung and into the kitchen coming to rest in the ironing board. The victim then went into the bedroom where he began [*350] bleeding. From there

he trailed blood into the living [***7] room where he shot himself a second time through the heart.

The two opposing theories derive from the physical evidence at the scene, the forensic analysis of that evidence, and the statements that the defendant made during the investigation. The defendant maintains the evidence was insufficient to exclude her theory of the evidence and to support the verdict of guilty. *Dowden v. Commonwealth*, 260 Va. 459, 467, 536 S.E.2d 437, 441 (2000), reiterated the precepts of appellate review of this issue:

Where the sufficiency of the evidence is challenged after conviction, it is our duty to consider it in the light most favorable to the Commonwealth and give it all reasonable inferences fairly deducible therefrom. We should affirm the judgment unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it Additionally, when a defendant challenges the sufficiency of the evidence, if there is evidence to sustain the verdict, this Court should not overrule it and substitute its own judgment, even if [**276] its opinion might differ from that of the jury.

(Citations and internal quotations omitted).

About 4:00 p.m., November 18, 1993, the [***8] defendant appeared at her neighbor's house, and stated, "I have been shot. Help me." The neighbor, a law enforcement officer, observed a gunshot wound that completely penetrated her abdomen. He saw a powder burn on her sweatshirt and a powder burn on her right hand that ran from her wrist to the first knuckle of her little finger. The defendant explained that she and her husband were arguing, and he went into the bedroom. When she knocked on the door to get him to come out, he jerked the door open, and shot her at very close range. "He just shot me and I ran." When asked, she specifically denied having touched the gun. When asked how she got the powder burn on her hand, she tried to rub it off with a washcloth.

At the neighbor's house, the defendant displayed no apprehension that her husband might pursue her. She exhibited no [*351] visible injuries other than the wound to her abdomen. The defendant stated she "did it all for Chris and Ketzie [her children from a prior marriage]," and "I'm all that Chris and Ketzie have now." As she left for the hospital, she said, "I may have heard another shot. I am not sure."

When police and sheriff's deputies went to the defendant's trailer, they [***9] found the victim sprawled across the living room floor lying in a pool of his blood, dead. In his left hand was a blood soaked rag; near the other was a pistol. Both of the victim's hands were bloody, but his palm carried no impression from the pistol grip. No blood was on the gun.

A path of blood led from the body, to the kitchen, past an overturned chair, and through the hall into the master bedroom. That bedroom was in shambles. The blinds and curtains were pulled from the window and strewn across the room. The bed covers including a red sheet were pulled off, and feathers from a ripped open pillow covered everything. Before disturbing the scene, investigators made a video recording and took extensive photographs throughout the trailer. These were presented at trial, and the witnesses used them extensively as visual aids to describe, define, and clarify their testimony.

The pistol on the living room floor was a .357 caliber revolver that contained three expended cartridges. Investigators located two bullets during the initial investigation. One remained in the victim barely penetrating the skin of his back. A second bullet lodged in an ironing board in the laundry room behind [***10] the kitchen. It penetrated the kitchen wall on a slightly downward trajectory 45 inches above the floor and passed through a box of detergent before coming to rest.

The investigators could not find the third bullet though they searched the trailer for two days. They searched for it most extensively along a path running from the bedroom door, where the defendant said her husband had fired it, down the hallway through the kitchen. They found no bullet, hole, or other trace of it. They also found no hole that the third bullet may have caused anywhere in the structure or its furnishings. [*352] Four different officers testified affirmatively that it was not in the windowsill of the kitchen window. The bullet was not produced until about two weeks later.

Two weeks after the homicide, the chief investigator informed the defendant that the sheriff's office could not rule the death a suicide because they "have got a missing bullet, the one you was shot with and, you know, we can't find it." A few days later the defendant called the investigator and informed him that she had located the bullet. He returned to the defendant's trailer, and the defendant took him to the kitchen, moved the curtain at [***11] the window, and showed him a .38 caliber bullet. The bullet was "lying . . . in the sill like it had never been moved." Later analysis revealed a single red thread was attached to it.

Laboratory analysis of the physical evidence established that the decedent had been shot twice in the chest from a maximum distance of one inch. The defendant had been shot from the same range. All three shots came from the revolver recovered from the living room. No discernible fingerprints [**277] appeared on the gun, and it gave no indication that it had been wiped clean.

The autopsy report described the wounds and the paths of the bullets through the victim's body. Both entered his front chest. One penetrated the right lung and

exited the body. The other penetrated the heart but did not exit. Either wound was lethal, but the bullet through the lung most likely would not cause death for several minutes. The bullet through the heart caused death almost immediately. If the bullet through the lung were the first shot, the victim would have been capable of inflicting both wounds. The wounds to the victim "could be self inflicted or inflicted by someone else."

The Commonwealth presented extensive testimony [***12] from forensic experts that explained and interpreted the physical evidence found at the scene. The gunshot residue analysis could not determine whether the defendant or the victim had fired the gun. The victim had primer residue on both hands. The defendant had primer residue on her face and right hand, [*353] and she had "particles that were indicative of primer residue on her left hand."

An expert in firearms stated the muzzle of the revolver was "at or near contact" when it discharged into the defendant. To deposit gunpowder on a person's hand the hand would have to be less than one inch from the gun. Touching a gun when it was not being fired would not leave a powder burn.

A blood stain and spatter analysis interpreted the blood found at the scene. A single trail of the victim's blood began in the bedroom. It ran down the hall, through the kitchen, and into the living room. Nothing suggested more than one trail of blood. The victim had stepped in his blood between the kitchen and the living room and then transferred it to the carpet as he moved into the living room.

The defendant called the medical examiner to explain that a person with a wound through the lung most likely would live [***13] for a few minutes but could survive for several hours. The medical examiner was not able to conclude when the blood started to flow from the wound to the lung. It was possible for someone to walk twelve to fifteen feet after being shot without dripping any blood on the floor. It was also possible to walk that distance, pull blinds and curtains off the bedroom wall, walk another twenty feet into the living room, and inflict a second gunshot wound.

The Commonwealth presented evidence of the defendant's statements and remarks made over the course of the investigation. The subsequent explanations varied from those made initially to her neighbor. At the hospital while she was still in the emergency room, the defendant stated she walked away from the bedroom door into the kitchen. She was standing near a chair beside the kitchen table when the husband opened the bedroom door and shot her. He was from five to eight feet from her when he shot. He then came towards her and brandished the pis-

tol. She struck it with her right hand and begged him not to kill her. She jerked away and ran to neighbors.

[*354] The next morning, the defendant said she and her husband were arguing about money. He went to [***14] her car and did something to it. He returned and locked himself in the master bedroom. She went to the door and demanded to know what he had done to her car. He opened the door, shot her, but then caught her in the kitchen. She hit his gun hand without touching the gun and ran out the front door. She thought she heard another shot as she ran off the porch. About two weeks later, the defendant said the argument was over her not spending more time with him, and they had discussed getting a divorce. That time, she denied hearing any shots after she left the house.

Two other incidents suggested that the defendant was present after the victim was shot and that she lacked remorse. She was present during interrogation of the deputy chief medical examiner. When asked whether the victim would have been in pain after the first shot, the defendant interjected, "a lot." Another time during the investigation, witnesses described her as laughing and giggling as she viewed the photographs of her dead husband on the floor of the trailer.

[**278] From the evidence presented, the jury must determine credibility and the weight of that which it finds as true. "[The weight which should be given to evidence and [***15] whether the testimony of a witness is credible are questions which the fact finder must decide." *Cantrell v. Commonwealth*, 7 Va. App. 269, 290, 373 S.E.2d 328, 339, 5 Va. Law Rep. 734 (1988) (quoting *Bridgeman v. Commonwealth*, 3 Va. App. 523, 528, 351 S.E.2d 598, 601, 3 Va. Law Rep. 1521 (1986)).

After determining credibility and assessing the weight of the testimony, the jury must ascertain what reasonable inferences arise from the facts they found proven by that testimony. "What inferences are to be drawn from proved facts is within the province of the jury . . ." *Id.* (quoting *Higginbotham v. Commonwealth*, 216 Va. 349, 353, 218 S.E.2d 534, 537 (1975)). If alternative inferences are possible, the jury resolves the differences and determines which inferences are reasonably drawn. "The jury must use its experience [*355] with people and events in weighing the probabilities." *Holland v. United States*, 348 U.S. 121, 140, 99 L. Ed. 150, 75 S. Ct. 127 (1954). The trier of fact has the responsibility "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). [***16]

Finally, the jury decides if the proven facts, and the reasonable inferences drawn from them, establish guilt

beyond a reasonable doubt. If so, the jury, as instructed, convicts. If the jury decides that a theory of innocence remains and the theory is reasonable, it, as instructed, acquits. "Whether an alternative hypothesis of innocence is reasonable is a question of fact . . ." *Archer v. Commonwealth*, 26 Va. App. 1, 12, 492 S.E.2d 826, 832 (1997).

On appeal, we review the jury's decision to see if reasonable jurors could have made the choices that the jury did make. We let the decision stand unless we conclude no rational juror could have reached that decision. "If there is evidence to sustain the verdict, this Court should not overrule it and substitute its own judgment, even if its opinion might differ from that of the jury." *Dowden*, 260 Va. at 467, 536 S.E.2d at 441 (citations and internal quotations omitted).

Three shots were fired and inflicted three distinct wounds: two to the victim, one to the defendant. The person who fired the shot through the victim's lung fired the shot through his heart. Both sides agree to that inference. The [***17] person who fired those two shots could have been the victim or the defendant.

The shot through the victim's heart was fired in the living room where the bullet remained lodged in him. Both sides agree to that inference. The place where the other two bullets were discharged is not so easily fixed. Tangible damage does not record the path of the bullet found in the windowsill, and the Commonwealth and the defense do not agree about it. However, they do agree that the same bullet could not have hit both the victim and the defendant.

[*356] The path of the bullet into the ironing board was exactly opposite to the path of a bullet found in the windowsill: the former going from right to left when facing the trailer and the latter going from left to right. The location of the bullet in the windowsill was approximately in the same plane as that formed by the wall between the kitchen and the laundry room. If the ironing-board-bullet struck the defendant, the victim did not fire a shot from the bedroom door, down the hall, and into her as she claimed.

Before the jury scrutinized the evidence, theoretically either bullet could have hit either person. The ironing-board-bullet or the windowsill-bullet [***18] could have hit the victim or the defendant. But, once the believable evidence links one of the two bullets to one of the two persons shot, the other bullet must be linked to the other person shot. Defining whom the ironing-board-bullet struck defines whom the windowsill-bullet struck. If the bullet in the ironing board passed through the victim's lung, then the bullet in the windowsill hit the defendant. If the ironing-board-bullet passed through the defendant, then the windowsill-bullet pene-

trated the victim's lung. The possible explanations were mutually exclusive.

[**279] Defining which bullet struck which person defines whether the homicide is murder or suicide. The victim committed suicide if the ironing-board-bullet hit him or if the windowsill-bullet hit the defendant. Conversely, the defendant committed murder if the ironing-board-bullet hit her or if the windowsill-bullet hit the victim. When evidence establishes the truth or falsity of any one of the alternatives, it resolves the truth or falsity of all possibilities. In doing so, it resolves the guilt or innocence of the defendant beyond a reasonable doubt.

The jury resolved the issue of whether a bullet passed from the bedroom [***19] door, through the defendant, and landed in the windowsill. The verdict reflects the jury's decision to disbelieve the defendant's story. Four witnesses stated unequivocally that the sill contained no bullet the night of the shootings. The bullet suspiciously appeared after the investigator told the defendant he would not rule the death a suicide [*357] without it. Other evidence contributed to make the defendant's story unlikely. According to the defendant, the bullet traveled a maximum distance of six to eight feet and landed at nearly a right angle to the initial axis of flight. It landed in the corner of the windowsill closest to the point of discharge, but it was so spent it dropped onto the sill without breaking the window, marking the sill, or tearing the curtains that covered the window.

In deciding to disbelieve the defendant's claim she found the bullet, the jury would have considered and evaluated her other statements and conduct. From her first statement to her neighbor, she gave stories incompatible with irrefutable physical facts. She claimed she had never touched the gun, but she had a large powder burn on her hand, which she tried to wash off. The defendant maintained she [***20] was six to eight feet from the gun when shot, but the residue on her sweatshirt established the gun was within one inch of her when it discharged. She claimed she left the trailer before the victim was shot, but she made remarks that indicated otherwise.

The jury was entitled to evaluate the reasonableness of the defendant's story. "Moreover, the jury was not required to believe the defendant's explanation, and if that explanation is not believed, the jury may infer that the accused is lying to conceal his guilt." *Black v. Commonwealth*, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981). The jurors did not believe the bullet landed in the windowsill where the defendant said she found it. If that basic fact was not true, it was not reasonable to infer the ultimate fact that the shot was fired from the bedroom door, through the defendant, and onto the windowsill. Having found the defendant lied, reasonable jurors could

infer that she found the bullet elsewhere in the trailer and planted it in the windowsill hoping to bolster her story that she was shot by the victim. Such decisions were neither arbitrary nor capricious, but the very essence of trial by jury.

The physical [***21] evidence permits a reasonable conclusion that the defendant shot herself and was not shot by the victim. [*358] The ironing-board-bullet penetrated the wall 45 inches from the floor, the exact height of the entrance wound to the defendant. The jury used its experience with people and events in weighing the probabilities of the defendant's story: that the victim decided to shoot the defendant during their argument; that he found the defendant's gun, *hidden where she did not expect him to find it; and that he used it rather than his own pistol, which was loaded and readily available.* The jury also assessed the probability that the victim, after shooting the defendant once, let her flee from his grasp without firing a second time.

The jury determined it was not reasonable to believe the victim first shot himself in the lung, then walked to the bedroom without bleeding where he tore the room apart, and then walked back to the living room before shooting himself the second time. The victim dripped blood from the bedroom, to the kitchen, to the living room. The trail began next to the dresser under which the defendant had hidden her gun. It inexorably records his path of weakening capacity and [***22] diminishing consciousness from the bedroom into the living room where the fatal shot penetrated his heart. The jury assessed the demonstration of the way the victim had to hold the gun to inflict the first wound. The [**280] victim was right-handed. The shot entered near the nipple passing from right of center up and outward. The victim had emergency medical training and knew where his heart was. The lung shot would have required a conscious contortion to avoid the heart.

The jury also assessed whether it was reasonable to believe the victim could walk dripping the trail of blood shown in the exhibits without getting blood on his right hand. The gun had no blood or fingerprints on it, and the victim's right palm had no imprint from the pistol grip. An investigator testified he expected to find blood on the victim's hand because of the way he had dripped blood. The jury assessed whether that was reasonable in light of specific testimony the victim's palm contained blood distinctive from the type coughed from his mouth and nose as he lay dying.

[*359] The jurors assessed whether it was reasonable to infer that the defendant was present when the victim was shot. The defendant fled from the trailer [***23] but was not afraid the victim pursued her. The defendant made statements that indicated she knew he

was dead. She knew the victim was in pain from the lung shot. A blood-spatter expert found no indication that a smear of blood on the victim's back could have been made by him. One strand of the defendant's hair was trapped in the blood coughed up by the victim as he lay on the floor dying. The defendant was able to find the third bullet when no one else could.

The defendant argues in her brief that if an item of evidence is susceptible of two interpretations, the jury cannot rely on it to convict unless the Commonwealth shows the defendant's interpretation is impossible. That is, if another explanation is possible, the Commonwealth must exclude the possibility. It is a review of the facts we rejected in *Cantrell*.

The defendant's argument misapplies the requirement that the Commonwealth must exclude every reasonable hypothesis of innocence. The defendant applies the maxim to each individual item of evidence. If the defense offers a possible explanation for the item, the Commonwealth fails to exclude every reasonable hypothesis of innocence unless it shows the defendant's possible [***24] explanation is impossible. "We place too great a burden on the Commonwealth if we require it to exclude every possible theory or surmise presented by the defense." *Black*, 222 Va. at 841, 284 S.E.2d at 609.

For example, the defendant argues no inference can be drawn against her from the fact she had a large powder burn on her hand. The defendant maintained that shooting herself could not have made the particular shape of burn she received. She argued the evidence indicated that she could have received that burn by placing her hand just above the entrance wound as the gun fired into her. The Commonwealth maintained it was made by holding the gun while shooting herself. Both sides punctuated the testimony supporting their interpretations of this item of evidence with demonstrations. The [*360] jury had those demonstrations in mind while assessing whether the defendant's interpretation was reasonable under all the related facts and circumstances. On appeal we grant the inference favorable to the Commonwealth if it is reasonable. The record on appeal does not provide those demonstrations that give integral definition of the spoken word. However, the record does not require that [***25] we find it unreasonable to reject the defendant's theory and accept the Commonwealth's theory. Accordingly, an adverse inference could be drawn from the powder burn and the powder burn was a circumstance the jury could consider when deciding guilt.

The statement that circumstantial evidence must exclude every reasonable hypothesis of guilt is an alternative way of stating the fundamental precept that the Commonwealth has the burden to prove each element of an offense beyond a reasonable doubt. It reiterates "the

standard applicable to every criminal case." *Cook v. Commonwealth*, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983); see *Holland*, 348 U.S. at 140. Circumstantial evidence is not viewed in isolation. "While no single piece of evidence may be, sufficient, the 'combined force of many concurrent and related circumstances. [**281] each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion.'" *Derr v. Commonwealth*, 242 Va. 413, 425, 410 S.E.2d 662, 669, 8 Va. Law Rep. 1350 (1991) (quoting *Stamper v. Commonwealth*, 220 Va. 260, 273, 257 S.E.2d 808, 818 (1979) (quoting *Karnes v. Commonwealth*, 125 Va. 758, 764, 99 S.E. 562, 564 (1919))). [***26]

Whether the defendant's explanation is a "reasonable hypothesis of innocence" is a question of fact." *Cantrell*, 7 Va. App. at 290, 373 S.E.2d at 339. A jury does not have to accept a fact if they find the basis for it is improbable. It can be improbable because it is based on testimony the jury does not believe; or it is not reasonable to draw an inference based on their collective experience of people and events. "It is within the province of the jury to determine what inferences are to be drawn from proved facts, provided the inferences are [*361] reasonably related to those facts." *Inge v. Commonwealth*, 217 Va. 360, 366, 228 S.E.2d 563, 567-68 (1976).

Much of the evidence in this case was undisputed. The two sides offered opposing interpretations. A jury resolves such conflict. Indeed, twice juries accepted the interpretation of evidence argued by the Commonwealth. "When, as here, conflicting inferences flow from the undisputed evidence, principles of appellate procedure require us to adopt those conclusions most favorable to the Commonwealth if fairly deducible from the proven facts." *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982). [***27]

1 This Court did not grant an appeal on the issue of the sufficiency of the evidence on the first appeal.

When the facts are viewed in the light most favorable to the Commonwealth and all reasonable inferences consistent with guilt are granted to it, no reasonable theories of innocence remain. The combined force of the many concurrent and related circumstances proved beyond a reasonable doubt that the ironing-board-bullet passed through the defendant. Thus, the victim could not have shot her, and he did not kill himself. As this jury reasonably viewed the evidence, only the defendant could have killed him. Accordingly, we affirm.

Affirmed.

CONCUR BY: Benton (In Part)

DISSENT BY: Benton (In Part)**DISSENT**

Benton, J., with whom Elder, J., joins, concurring, in part, and dissenting, in part.

I concur with the majority opinion on the issues of double jeopardy and prosecutorial misconduct. I dissent, however, from the majority's conclusion that the evidence was sufficient to sustain the convictions.

I.

At trial, the evidence [***28] proved that on the morning of November 18, 1993, a friend of Merry Pease's husband approached him at work because he thought Pease's husband was angry [*362] with him. He testified that Pease's husband was acting differently than normal and "just wasn't his self." Pease's husband said he thought Pease was having an extra-marital affair, and he said "something was going to happen real soon." The co-worker told Pease's husband that when he thought his own wife was having an affair, he had removed the ignition coil from her car so that she could not leave home. Pease's husband left work at the end of his shift at 8:00 a.m.

Later that afternoon, Pease loudly knocked at the door of a neighbor, who was a police officer, and said, "I have been shot. Help me." The neighbor called the emergency number and then attended to a wound near Pease's abdomen, where a "bullet had penetrated all the way through her." He saw a powder burn on her clothing and on her hand. In response to the neighbor's questions, Pease said her husband shot her and she had not touched the gun. Although he later wrote that Pease was shot "point blank," the neighbor testified that this was only his interpretation of what she said. [***29] He testified that Pease told him the following events occurred:

She said that they had been arguing and having some problems. That she had went [**282] to the back door, or the back bedroom to the door and was knocking on the door trying to get Dennis to come out. And she said that he jerked the door open and pointed the gun at her and shot her. And she turned around and ran out of the residence.

The neighbor testified that Pease said "as [she] went out of the house, [she] may have heard another shot." Pease also told him that her husband had disabled her car and that she first went to the road to get help but no one stopped.

Pease was transported to a hospital where she received medical treatment for a life-threatening wound to her abdomen. Several investigators questioned Pease

after she arrived at the hospital. Investigator Darnell testified Pease said that she and her husband had argued for "a couple of weeks," that her husband had taken her checkbook, and that, on this day, she had been unable to start her car. Pease also said she [*363] was five to eight feet from her husband, near a kitchen chair, when he shot her.

Investigator Robinson testified that they did not record their [***30] interview with Pease. He recalled she said the following in the interview:

She had gone to the bedroom door of the master bedroom and asked . . . what he had done to her car.

She turned and walked away from the bedroom into the kitchen or the bedroom door into the kitchen. The bedroom door opened and she turned and [he] fired a pistol striking her in the abdomen.

He came towards her. He brandished the pistol. She said she struck the pistol with her right hand and asked him, said please don't kill me, she jerked away from him and ran out the mobile home and ran seeking assistance at the next door neighbors'.

The police discovered Pease's husband dead in the living room of the home with two gunshot wounds, one to his right lung and a second wound to his heart. He was not wearing shoes or a shirt. A woman's underpants, drenched in his blood, was near his left hand. Feathers were on and near his body. In his pocket, the police found a wire from a car's distributor cap and a wire that had been removed from the home's telephone. A Ruger .357 revolver, which was the weapon that fired the bullets, was on the floor near his body; it had three empty chambers. The Commonwealth offered as [***31] evidence the autopsy report, which described the two gunshot wounds. The report also contains the notation: "If [the] wound [to the lung] was the first shot, [Pease's husband] would have been capable of inflicting both wounds." Pease's husband's blood had an alcohol content of .10.

The record contains extensive testimony concerning the condition and configuration of the mobile home residence. When the police entered the home, the primary bedroom was in disarray. The blinds from the bedroom window were on the floor and demolished. Feathers from a burst pillow were strewn about. The bedroom door, which could be locked from [*364] inside, was only six feet from the kitchen table. A kitchen chair was overturned in the hallway between the two rooms. Pease's husband's shoes were in one of the children's bedrooms, along with his cigarettes and an alcoholic drink. A desk had been overturned in that room.

The investigators found a bullet lodged in an ironing board near the kitchen. Another bullet, which caused the

wound to Pease's husband's heart, was found lodged in his back. The investigators searched that night for the third bullet but were unable to locate it. They also found no hole that [***32] the third bullet may have caused in the structure or its furnishings.

The next morning, the investigators again visited Pease in the hospital. One investigator said when they questioned Pease, she said she was in a lot of pain but wanted to talk. During this interview, Pease recounted the following:

They had been arguing for about two weeks about money and the kids, that that day they were arguing about money and she made a comment that he wouldn't give her enough money to run the household, that they had been arguing that morning about money.

* * * * *

[**283] She indicated she had went to the bedroom door to begin with because her husband, Dennis, had went to her car and done something to her car and came back into the trailer into the master bedroom, locked the door.

She went to the door and asked him what have you done to my damn car and he opened the door and shot her.

* * * * *

She gave Investigator Mullins an explanation that [her husband] had caught up with her, she was headed toward the living room but he had caught her in the kitchen and she had hit his hand that had the gun in it but that she never touched the gun.

* * * * *

When she pushed his hand that [***33] had the gun in it away in the kitchen, she ran out the front entrance of the trailer and [*365] she thought she heard another shot as she was running off the porch, the front porch of the trailer.

About two weeks later, Investigator Mullins visited Pease at her home. He testified that he told her the police could not rule this case a suicide because they "have got a missing bullet, the one you was [sic] shot with and, you know, we can't find it." When he asked if her husband abused her in the past, Pease said that she and her husband had argued about her spending more time with him, that she had told her husband she had to spend several days each week with her father, and that they had discussed getting a divorce. She said her husband had never accused her of being unfaithful, but he was extremely obsessive and possessive. Pease also told the investigators that her husband was strict with her children, that he was verbally abusive toward her, but that she had never

obtained warrants against her husband for abuse. When asked if she had heard any shots after she left the house, she said she had not.

Investigator Mullins testified that Pease called a few days later to inform him she had [***34] located the bullet. When he returned to Pease's home, Pease moved the curtain on the kitchen window and exposed a .38 caliber bullet. Investigator Mullins testified that the bullet was "lying . . . in the windowsill like it had never been moved." He also testified that the bullets were "wad cutters" that had previously been reloaded. He explained that the charges in the bullets were not as powerful as commercially purchased bullets and that, when shot from the gun, the bullet would not travel as fast as a regular, *manufactured bullet*.

The Commonwealth produced extensive evidence from police investigators and forensic experts. The investigators found no blood and no discernible fingerprints on the gun. They also found no indication that the gun had been wiped clean. An expert in gunshot residue testified that his analysis did not allow him to conclude whether Pease or her husband fired the weapon. He testified that Pease's husband had primer residue on both hands and that Pease had primer [*366] residue on her face and right hand and "particles that were indicative of primer residue on her left hand." The gunshot residue on hands could indicate the person fired a weapon or was in close proximity [***35] to the discharge of a weapon or handled a dirty weapon. He also testified "it would not be unusual at all for . . . primer residue to be found on [an] individual at a [distance] of six feet" and he would expect to find primer residue if an individual had a hand around the barrel of a revolver or around the cylinder.

An expert in the field of firearms and toolmarks testified that, based on his examination of Pease's sweatshirt, the muzzle of the revolver was "at or near contact" with Pease when it was discharged at her. He testified that a hand could have a gunpowder burn even without coming in contact with the gun "if the heel portion of the hand was directly above the muzzle, then it would pick up the residue as opposed to the extending fingers or down the elbow." The firearms expert testified that in order for gunpowder to deposit on a person's hand the person's hand would have to be less than one inch away from the gun and that he would not anticipate a burn on the heel of a person's hands would be caused by simply touching the gun when it was not firing.

A blood stain and spatter expert testified that the shots to Pease's husband would not [**284] necessarily cause blood to spray [***36] from the wound. She also testified that there was "one blood trail with connecting blood drops that connect from the bedroom area through that hall, through the kitchen and into the

living room." There was no indication that there had been multiple paths. The expert testified further that the blood on the floor between the kitchen and the living room had been disturbed "which indicates that . . . something had come into contact with that to move or to alter the blood that was in that pre-existing stain pattern." She testified that if someone's heel had disturbed the blood drop, that the foot would create a "diminishing repetitive transfer . . . every time it stepped." She also testified that there was evidence of such transfers on the floor and that a stain on the heel of Pease's husband's foot indicated he was responsible for the transfer.

[*367] Testifying as Pease's witness, the assistant chief medical examiner gave the only testimony about the autopsy report. He testified that if he had to choose, it is more likely that the shot to the heart was immediately incapacitating as opposed to the shot to the lung. He opined that a person with a bullet wound to the lung, such as found in Pease's [***37] husband, could live "at least a few minutes, probably several minutes . . . and in some cases, perhaps, . . . several hours." He testified that such a person "would have had enough strength and presence of mind to do a great many things including" walking twelve to fifteen feet and pulling blinds and curtains off the wall. He also testified that such a person could walk twelve to fifteen feet after being shot without dropping any blood on the floor and that it was not possible to conclude when the blood started to flow because that would depend on a number of factors including the position of that person's body. He further testified that it was possible that a person with this type of wound to a lung could have walked another twenty feet, the distance from the bedroom to the living room, and inflicted the second wound. He testified that "in the absence of any extraneous information, you could say this could be self inflicted or inflicted by someone else." He also testified that Pease's husband had a .10% blood alcohol content which would have affected his judgment.

At the conclusion of the evidence, the jury convicted Pease of second degree murder and use of a firearm in the commission [***38] of murder.

II.

"It is essential in every prosecution for the commission of a homicide that the Commonwealth prove the *corpus delicti*." *Lane v. Commonwealth*, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978). "To establish the *corpus delicti* in a homicide, the Commonwealth must prove the victim's death resulted from the criminal act or agency of another person." *Betancourt v. Commonwealth*, 26 Va. App. 363, 373, 494 S.E.2d 873, 878 (1998). As a matter of constitutional law, the Due Process Clause protects an accused from conviction "except upon proof [*368] beyond a reasonable doubt of every fact necessary to

constitute the crime with which [she] is charged." *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

No one saw Pease shoot her husband; thus, the Commonwealth relied upon circumstantial evidence to support the conviction. When a conviction is based entirely upon circumstantial evidence, we are guided by the following standards in our review:

Well established principles apply to testing the sufficiency of circumstantial evidence. [The Supreme Court has] summarized those principles as follows:

[***39] ". . . If the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions inconsistent with that of guilt. To accomplish that, the chain of necessary circumstances must be unbroken and the evidence as a whole must satisfy the guarded judgment that both the *corpus delicti* and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis and to a moral certainty. . . ."

[**285] But, circumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a verdict of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction.

Clodfelter v. Commonwealth, 218 Va. 619, 623, 238 S.E.2d 820, 822 (1977) (citations omitted).

The majority reasons that because the evidence provides a reasonable basis from which the jury could conclude Pease killed her husband, this Court must defer [***40] to the jury's decision. This reasoning, however, disregards the prosecutor's obligation to exclude every reasonable hypothesis of innocence whenever, as here, a conviction is based solely on circumstantial evidence. The law is clear:

[*369] Proof by circumstantial evidence "is not sufficient . . . if it engenders only a suspicion or even a probability of guilt. Conviction cannot rest upon conjecture." *Littlejohn v. Commonwealth*, 24 Va. App. 401, 414, 482 S.E.2d 853, 859 (1997) (citing *Hyde v. Commonwealth*, 217 Va. 950, 955, 234 S.E.2d 74, 78 (1977)). "All necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence." *Stover v. Commonwealth*, 222 Va. 618, 623, 283 S.E.2d 194, 196 (1981) (quoting *Inge v. Commonwealth*, 217 Va. 360, 366, 228 S.E.2d 563, 567 (1976)). "When, from the cir-

cumstantial evidence, 'it is just as likely, if not more likely,' that a 'reasonable hypothesis of innocence' explains the accused's conduct, the evidence cannot be said to rise to the level of proof beyond a reasonable doubt." *Littlejohn*, 24 Va. App. at 414, 482 S.E.2d at 859 [***41] (quoting *Haywood v. Commonwealth*, 20 Va. App. 562, 567-68, 458 S.E.2d 606, 609, 12 Va. Law Rep. 1 (1995)). The Commonwealth need not "exclude every possible theory or surmise," but it must exclude those hypotheses "which flow from the evidence itself." *Cantrell v. Commonwealth*, 7 Va. App. 269, 289-90, 373 S.E.2d 328, 338-39, 5 Va. Law Rep. 734 (1988) (citations omitted).

Betancourt, 26 Va. App. at 373-74, 494 S.E.2d at 878.

A jury's verdict founded merely upon a reasonable belief that Pease killed her husband is not a sufficient basis to meet the standard of proof beyond a reasonable doubt. Such a verdict simply means there is some evidence consistent with her guilt. See *Sullivan v. Louisiana*, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) (noting that the constitutional standard of proof beyond a reasonable doubt is not satisfied by "having a jury determine that the defendant is *probably* guilty"). The Supreme Court has "emphasized that proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability." *Jackson v. Virginia*, 443 U.S. 307, 315, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). [***42] These principles also are articulated decisions as follows:

[*370] It is well settled in Virginia that to justify conviction of a crime, it is not sufficient to create a suspicion or probability of guilt, *but the evidence must establish the guilt of an accused beyond a reasonable doubt*. It must exclude every reasonable hypothesis except that of guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

Cameron v. Commonwealth, 211 Va. 108, 110-11, 175 S.E.2d 275, 276 (1970) (citations omitted) (emphasis added). In short, as here, where "inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith." *Dotson v. Commonwealth*, 171 Va. 514, 518, 199 S.E. 471, 473 (1938).

Several investigators and Pease's neighbor testified from their notes about statements Pease made to them at various times. None of Pease's statements were recorded, and Pease gave no written account of the events. In each rendition of Pease's statements, however, Pease denied shooting her husband and said her husband [***43] shot her. Noting that Pease made several statements concerning the events and her conduct that ensued, the

Commonwealth argues in its brief, that the jury could reasonably find that Pease contradicted [**286] herself on various things including (i) whether a struggle occurred in the kitchen, (ii) her distance from her husband when he shot her, (iii) whether she heard a shot as she ran from the home, (iv) whether she found the bullet on the windowsill, and (v) how she received the burn on her hand. None of the conflicts, however, excludes Pease's story that her husband committed suicide.

Although the jury is entitled to believe that Pease made contradictory statements, Pease's statements concerning what transpired must be viewed in the context in which they were made. The Supreme Court has held that "the probative value of [a defendant's] inconsistent statements must be determined in light of the situation in which they were made." *Hyde v. Commonwealth*, 217 Va. 950, 955, 234 S.E.2d 74, 78 (1977). Pease's conflicting statements unquestionably were [*371] made at a time when Pease was in severe pain from the gunshot wound. Furthermore, most of the conflicts in the statements concerned [***44] matters that are not material concerning the identity of the shooter.

The evidence proved the events occurred inside a mobile home, where the distances are not great. Although the evidence proved the bedroom was in disarray, no evidence established that Pease caused it or was in the bedroom when it occurred. The evidence is consistent with her statements that her husband locked himself in the bedroom after he removed a wire from the car's distributor cap. The evidence further proved that Pease's husband had been drinking alcohol and that the room where his drink was located was also in disarray. Moreover, the evidence proved that the distance from the door of the bedroom to the kitchen table was only six feet. Each of Pease's statements places her between the bedroom door and the kitchen when she was shot. The Commonwealth's firearms expert testified that the muzzle of the firearm was "at or near contact" with her when it was fired. The expert's testimony is not inconsistent with Pease's statements that she did not fire the gun. This evidence is also consistent with Pease's defense that her husband shot her in this area at close range.

The Commonwealth and the majority opinion make [***45] much of the fact that Pease found the third bullet and suggest that the jury could find that she placed it there. The evidence is undisputed, however, that three bullets were discharged from the gun. Although the investigators searched the residence, they did not find it. Tellingly, one investigator testified, when asked whether he was looking for the bullet or the bullet hole, "well of course, we were looking for the bullet hole. You have got to find the hole before you can find the bullet." Indeed, it is likely the officers failed to find the bullet because they were looking for a bullet hole.

The evidence proved that the bullet had been reloaded and did not have the usual charge. The bullet was a "homemade reload" with a "low load." Thus, a forensic expert testified [*372] that such a bullet, having an altered, reduced charge which passed through a body, could have struck the structure without penetrating it and fallen to the windowsill. The forensic evidence, therefore, does not negate the conclusion that the bullet landed in the windowsill. Indeed, the forensic expert testified that if the gun was shot from the bedroom area door at someone in the hallway, the bullet could possibly go [***46] to the kitchen window area. Depending on trajectory, velocity, and the angle of the bullet, the bullet could have landed on the windowsill.

In addition, no evidence explained the red fiber the Commonwealth contends was on the bullet. The Commonwealth did not ask the examiners to compare it with any other fibers. Moreover, the forensic expert testified that he did not know, of his own knowledge, that the fiber came from the bullet. The evidence proved, however, that the officer who collected the bullet from the windowsill put it in a bag that "came from [his] lunch" and, thus, may have exposed the bullet to extraneous substances.

Moreover, the evidence does not conclusively establish that the bullet found lodged in the ironing board was the bullet that penetrated Pease. The firearms expert testified that the bullet that went into the ironing board was on a downward trajectory. The evidence established that in order for [**287] this to be the bullet that went through Pease's abdomen Pease would have had to be against the wall when the shot was fired. Given the downward trajectory of the bullet, it could also have been the bullet that entered Pease's husband's lung. Therefore, this evidence [***47] is consistent with the forensic evidence that the bullet retrieved from the windowsill was the bullet that wounded Pease. In view of the forensic evidence, the investigators' testimony that they thoroughly searched the house for the third bullet reasonably establishes that they obviously overlooked the bullet in the windowsill.

The Commonwealth also argues that the evidence is inconsistent with Pease's assertion that she was not present when her husband was wounded. The Commonwealth points to a strand of Pease's hair found in the puddle of blood from her [*373] husband's mouth and to a foreign DNA substance found on Pease's shoe as evidence that Pease was present when her husband was shot. Although the evidence established that one blond hair that had been forcibly removed from Pease's head was in a puddle of blood near her husband's mouth, an expert in hair and natural fiber examination testified that it was possible the hair could have been removed in combing. Only one strand of hair was found. The expert

testified it was unlikely that only one strand of hair could have been forcibly pulled from a person's head by another person. The expert also testified that this hair could have been [***48] transported from the husband's clothes. Furthermore, Pease's hair would likely be found at any place in her own residence.

A forensic expert in DNA testing testified that DNA material, consisting of blood and some other material, was found on Pease's left shoe. He explained that "the major profile [of the DNA found in the blood] was consistent with . . . Pease." There were also regions of DNA with genetic material inconsistent with Pease's DNA. The DNA material in these regions could have been indicative of a small amount of blood or saliva, sweat, or some other bodily fluid. Although the expert could not rule out Pease's husband as a possible contributor, the DNA was also found in one out of seven people of the Caucasian population in that region. More importantly, the expert could not identify when the DNA material was deposited. Therefore, neither piece of evidence establishes that Pease was present when her husband was wounded. This evidence was merely indicative of the fact she lived in the residence.

The Commonwealth argues that the jury could reject Pease's hypothesis that her husband shot her and then shot himself. It argues that her husband had told his co-worker that [***49] he believed Pease was having an extra-marital affair, that Pease was unsympathetic after her husband's death, and that Pease had a financial motive to kill her husband.

Although the record contains extensive testimony about forensics, the evidence fails to disprove the hypothesis that Pease's husband was the shooter. A large amount of testimony [*374] centered on where the shots were fired and whether the location of the bullets matched Pease's account of what had transpired. The assistant chief medical examiner testified that it was certainly possible for Pease's husband to inflict both wounds to himself. He testified that after the first lung shot, a person could live "at least a few minutes, probably several minutes . . . and in some cases, perhaps, . . . several hours." He testified that Pease's husband "would have had enough strength and presence of mind to do a great many things including" walking into the bedroom and pulling blinds and curtains off the wall. Moreover, he also testified that Pease's husband's intake of alcohol would have affected his judgment.

He further opined that it was also possible that Pease's husband could have walked from the bedroom to the living room, which [***50] is immediately adjacent to the kitchen area, and inflicted the second wound. Although he did not know whether it happened, he testified that it was possible for a person to walk twelve to fifteen

feet after being shot without dropping any blood on the floor. According to the assistant chief medical examiner, it was just as reasonable as not to believe that Pease's husband walked down the hallway without depositing blood, pulled the blinds from the window, and shot himself in the heart.

[**288] The Commonwealth argues that because there was blood on Pease's husband's hands, he could not have handled the gun to fire the second shot to his heart which an expert explained would have been immediately incapacitating. A blood stain and spatter expert explained, however, that the shots to Pease's husband would not necessarily cause blood to spray from the wound. The experts also testified that the blood on Pease's husband's hands could have come from coughing blood from his nose and mouth. Although there was evidence that Pease's husband could have been carrying, in one hand against his wound, the woman's underpants that were found by his body, no evidence ruled out the reasonable possibility that [***51] Pease's husband had blood on the hand carrying the woman's underpants and no blood on the other hand carrying the gun.

[*375] The evidence revealed that no blood from the heart shot had flowed down toward Pease's husband's jeans but a small amount of the blood had flowed across his back as he lay on the floor. Contrary to the blood spatter expert's opinion that there was no indication Pease's husband had been upright when the shot to his heart was fired, the assistant chief medical examiner testified that Pease's husband could have been standing but the blood began flowing after he was on his side. He also opined that Pease's husband could have been standing when the shot to his lung was fired and that it was not necessary for him to have been against any surface for the bullet to have remained lodged in his back. In short, the evidence did not negate the hypothesis that Pease's husband fired the second shot and that he committed suicide.

Although the Commonwealth argues that the jury could infer that Pease had a motive to kill from the husband's belief that Pease was having an affair, no evidence in this record establishes the truth of the husband's supposition. The testimony by the co-worker [***52] of Pease's husband gives an indication, however, of the husband's beliefs and his state of mind. Indeed, the testimony reveals that several hours before the shooting the husband was "not himself," appeared to the co-worker to be angry, and expressed the view that "something was going to happen real soon." The evidence further proved the husband drank enough alcohol to affect his judgment after he left work that morning. He also disabled Pease's car, as his friend suggested, and disabled the telephone in the home. This evidence tends to prove that Pease's hus-

band had a motive to initiate what transpired in the Pease home on November 18, 1993.

Investigator Parker testified that Pease was present when investigators interviewed the deputy chief medical examiner regarding the incident. When the investigators asked the medical examiner whether Pease's husband had been in pain after the first shot, Pease said "a lot." Another investigator testified that he was present when Pease viewed the pictures of her house and her deceased husband. He said Pease [*376] laughed when she saw the pictures, and another witness stated that Pease "was giggling and laughing and pointing at them and making notes on [***53] a paper." Although these were matters the jury could consider, they indicated only inappropriate reactions after the fact and are not inconsistent with the conclusion that her husband shot her.

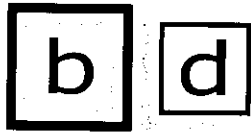
The Commonwealth also notes that Pease's neighbor testified that while Pease was in his home waiting for the emergency response team, he overheard part of the conversation she was having with his wife. He testified that Pease was telling his wife about "some problems she had been having." After discussing the need to have someone get her children, Pease then "leaned back in the chair" and said "I either done or did it all for [my children]." Although the Commonwealth argues that the jury could have concluded that Pease's statement was incriminating, Pease's neighbor's testimony clearly indicates that he heard only part of the conversation. The evidence fails to reveal the entire context in which Pease's statement was made. Pease's comment could reasonably relate to the discussion she was having with her neighbor's wife about her marital problems. Indeed, Pease later told the investigators she and her husband had argued for weeks about their children and her husband's failure to provide "enough [***54] [**289] money to run the household." Thus, this evidence is also not inconsistent with the hypothesis that her husband shot her. Where the facts are "equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, the jury cannot arbitrarily adopt the interpretation which incriminates [the accused]." *Massie v. Commonwealth*, 140 Va. 557, 564, 125 S.E. 146, 148 (1924).

A witness from the Social Security Administration testified that as a result of Pease's husband's death Pease would receive \$ 718 a month until her youngest daughter was age 16 and her two children would received \$ 718 a month until they were age 18. No evidence proved, however, that Pease knew that she would receive this amount of social security benefits as a result of her husband's death. Without additional speculation, this evidence does not aid the Commonwealth's theory [*377] that Pease wanted to kill her husband to advance her personal financial gain.

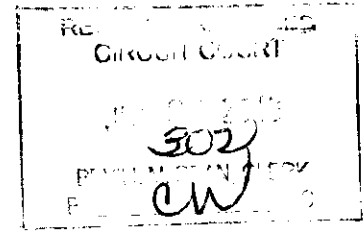
39 Va. App. 342, *, 573 S.E.2d 272, **,
2002 Va. App. LEXIS 741, ***

Viewed in the light most favorable to the Commonwealth, the evidence does not exclude the reasonable hypothesis that Pease's husband shot her and himself. The forensic evidence does not exclude that reasonable hypothesis. [***55] The close contact nature of the shots is consistent with that hypothesis. "The doctrine [is long-standing] that where the evidence leaves it indefinite which of several hypotheses is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be." *Massie*, 140 Va. at 565, 125 S.E. at

148 (citing *Johnson's Case*, 70 Va. (29 Gratt.) 796, 817 (1878)). In view of the significant, substantial evidence of suicide, the jury could not have inferred beyond a reasonable doubt from the evidence that Pease killed her husband. As in this case, convictions cannot be based on "speculation and surmise." *Lane*, 219 Va. at 515, 248 S.E.2d at 784. Because the Commonwealth failed to exclude Pease's hypothesis of innocence, and all circumstantial evidence is not consistent with guilt, I would hold the evidence was insufficient to prove Pease's guilt beyond a reasonable doubt.



benjamin and desportes



July 1, 2013

Bevill M. Dean, Clerk
Richmond Circuit Court – Criminal Division
John Marshall Courts Building
400 N. 9th Street
Richmond, VA 23219
HAND DELIVERY

Re: *Commonwealth v. Todd Schneider*
Case Nos. CR13F-1960 thru 1963
Defendant's Reply to Opposition to Motion to Dismiss Indictments

Dear Mr. Dean:

Enclosed please find the Defendant's Reply to Opposition to Motion to Dismiss Indictments which I would appreciate your filing with the papers in the referenced matter.

Thank you for your attention to this matter.

Sincerely yours,

Steven D. Benjamin

cc: Gregory Underwood
Brent A. Johnson
Ramin Fatehi
Office of the Commonwealth's Attorney
for the City of Norfolk

Benjamin and DesPortes, Attorneys

Mailing address: P.O. Box 2464, Richmond, VA 23218
Street address: 11 S. 12th Street, Suite 302, Richmond, VA 23219
804.788.4444 Fax 804.644.4512